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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 238

STATE OF OHIO EX REL. PAULINE WADSWORTH, APPELLANT,

vs.

JOHN A. ZANGERLE, AUDITOR OF CUYAHOGA COUNTY; THE BOARD OF PARK COMMISSIONERS OF THE METROPOLITAN PARK DISTRICT IN CLEVELAND, HARRY M. FARNSWORTH, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OHIO

FILED JULY 12, 1929

(34,369)

(34,369)

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[fols. 1 & 2] **IN SUPREME COURT OF OHIO**

No. 21336

STATE OF OHIO ex Rel. PAULINE WADSWORTH, Taxpayer, Bay Village, Ohio, Appellant,

v.

JOHN A. ZANGERLE, Auditor of Cuyahoga County; THE BOARD OF PARK COMMISSIONERS OF THE METROPOLITAN PARK DISTRICT IN CLEVELAND, HARRY M. FARNSWORTH, WARREN S. HAYDEN, LOUIS E. MOSES, WM. A. STINCHCOMB, and THE UNION TRUST COMPANY, a Corporation, Appellees

PETITION FOR APPEAL—Filed June 13, 1929

To the Honorable Carrington T. Marshall, Chief Justice of the Supreme Court of Ohio:

The petition of State of Ohio ex rel. Pauline Wadsworth, respectfully shows: That heretofore, towit, upon the 27th day of March, 1929, and upon the 5th day of June, 1929, there was rendered by this Court in the error proceedings entitled and bearing the docket number as above, a judgment affirming the judgments of the lower courts in a taxpayer's suit commenced in the Court of Common Pleas of Cuyahoga County, by the State of Ohio, ex rel. Pauline Wadsworth, against John A. Zangerle, Auditor of Cuyahoga County, The Board of Park Commissioners of The Metropolitan Park District in Cleveland, Harry M. Farnsworth, Warren S. Hayden, Louis E. Moses, Wm. A. Stinchcomb, and The Union Trust Company, for injunction against the levying of taxes and the completing of contracts by said Park District Commissioners, in which proceeding and in the error proceedings for the review thereof in the Court of Appeals for Cuyahoga County, and in this court, there was drawn in question the validity of the "Park District Act" of the State of Ohio, General Code Sections 2976-1 to 2976-10c, inclusive, (107 Ohio Laws, pages 65 to 69), and [fol. 3] the amendments thereto, Sections 2976-1 to 2976-7, and the supplemental sections, 2976-10d to 2976-10i (108 Ohio Laws, Part 2, pages 1097 to 1100), on the ground of

their being repugnant to the provisions of Article XIV, Section 1, of the amendments to, and of Article IV, Sections 2 and 4, of the Constitution of the United States in respect to the breach of the privileges and immunities and other rights of citizens, and of the guaranteed form of State government, by the vesting of the taxing and other legislative powers of the State of Ohio in nonelective officials of that State; and there was further drawn in question the validity of Section 2 of Article IV of the Constitution of Ohio on the ground of its being repugnant to the provisions of Article XIV, Section 1 of the amendments to the Constitution of the United States in regard to the denial of the equal protection of the laws by the Ohio Supreme Court's rendering of minority judgments on constitutional questions, and the decision in each of said matters was in favor of the validity of said statutory and constitutional provisions of the State of Ohio,—there being manifest error in the premises greatly to the damage of this appellant in refusing such injunction.

Appellant further shows that the said judgment of the Supreme Court of Ohio was and is a final judgment of the highest court of the State of Ohio in which a decision in said suit could or can be had; that a federal question was made in said case, towit, as hereinbefore set out; and that said judgment of said Supreme Court of Ohio was and is repugnant to, and in conflict with, the Constitution of the United States to which the said judgment of the Supreme Court of Ohio was contrary, albeit a decision of the said federal question was necessary to the judgment rendered; all of which more fully appears in the Assignment of Errors filed herewith.

Wherefore said appellant presents herewith an exemplified transcript of the record of the Supreme Court of Ohio in said case and prays that an appeal from said Supreme Court be allowed; that citation be granted and signed; that the bond herewith presented be approved as security for costs.

State of Ohio ex rel. Pauline Wadsworth, by Frederick A. Henry, for George D. Hile, and Snyder, Henry, Thomsen, Ford & Seagrave, Williamson Bldg., Cleveland, Ohio, Attorneys for Appellant.

[fol. 4] The appeal as prayed for in the foregoing petition is hereby allowed and the bond for security for costs tendered therewith is hereby approved.

Dated at Columbus, Ohio, this 13th day of June, 1929.

Carrington T. Marshall, Chief Justice of the Supreme Court of the State of Ohio.

[fol. 5] [File endorsement omitted.]

[fol. 6] IN SUPREME COURT OF OHIO

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 13, 1929

The appellant in the above entitled suit having prayed for the allowance of an appeal in this case to the Supreme Court of the United States from the judgement and order or orders made and entered in the above entitled suit by the Supreme Court of the State of Ohio on the 27th day of March, 1929, and on the 5th day of June, 1929, and from each and every part thereof, and having present on file their petition for appeal, assignment of errors and prayer for reversal, pursuant to the statute and to the rules of the Supreme Court of the United States in such case made and provided:

It is now here ordered that an appeal be, and the same is hereby, allowed to the Supreme Court of the United States from the Supreme Court of the State of Ohio in the above entitled cause as provided by law, and it is further ordered that the Clerk of the Supreme Court of the State of Ohio shall prepare and certify a transcript of the record, proceedings and judgment (or decree) in this case and transmit the same to the Supreme Court of the United [fol. 7] States, and he shall have the same in said Court within thirty days from this date.

And it is further ordered that the surety for costs on appeal be fixed in the sum of Five Hundred Dollars ($500.00).

Dated this 13th day of June, 1929.

Carrington T. Marshall, Chief Justice of the Supreme Court of Ohio.

[fol. 8] [File endorsement omitted.]

[fol. 9] IN THE SUPREME COURT OF OHIO

[Title omitted]

ASSIGNMENT OF ERRORS—Filed June 13, 1929

The appellant, State of Ohio, ex rel. Pauline Wadsworth, files this assignment of errors to be reviewed by the Supreme Court of the United States on appeal from the Supreme Court of Ohio; said Supreme Court of Ohio having erred in the above entitled case in finding and deciding as follows:

1. That, "it appearing that five members of this Court (Robinson, Jones, Matthias, Day and Allen, JJ) are of the opinion that Sections 2976-4, 2976-5, 2976-10, 2976-10c, 2976-10e, 2976-10i of the General Code of Ohio are unconstitutional; that two members (Marshall, C. J. and Kinkade, J) are of the opinion that said sections are not repugnant to any constitutional provision; that the Court of Appeals held the said statutes constitutional and that in such cases the Constitution of Ohio requires a concurrence of all but one of the members of the Supreme Court to declare a law unconstitutional, it is ordered and adjudged that the judgment of the said Court of Appeals be and the same hereby is affirmed."

2. That said provision of Article IV, Section 2 of the Constitution of Ohio, directing that "No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but one of the judges, except [fol. 10] in the affirmance of a judgment of the Court of Appeals declaring a law unconstitutional and void", does not violate Article XIV, Section 1 of the Constitution of the United States, nor operate in said State of Ohio to "deny to any person within its jurisdiction the equal protection of the laws".

3. That the "Park District Act" of the State of Ohio, General Code Sections 2976-1 to 2976-10c, inclusive (107 Ohio Laws, pages 65-69) and the amendments thereto, Sections 2976-1 to 2976-7, and the supplemental Sections 2976-10d to 2976-10i (108 Ohio Laws, Part 2, pages 1097-1100), in every part thereof, is a valid law, and that none of said sections 2976-4, 2976-5, 2976-9, 2976-10, 2976-10c, 2976-10e, and 2976-10i, is unconstitutional; that neither said

act nor any of said sections violates Article XIV, Section 1 of the amendments to the Constitution of the United States, nor operates in said State of Ohio to abridge the privileges or immunities of citizens of the United States or of the several states, nor deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws; and that neither said act nor any of said sections, by delegating legislative power or by vesting the taxing or other legislative power in non-elective officials, violates Article IV, Sections 2 and 4 of the Constitution of the United States, nor conflicts with the guaranty of a republican form of government for said state.

Wherefore said appellant prays that the foregoing assignment of errors be allowed by this court, and that the judgment and order or orders of this court may, by reason thereof, be reversed by the Supreme Court of the United States.

George D. Hile and Snyder, Henry, Thomsen, Ford & Seagrave, by Frederick A. Henry, Attorneys and of Counsel for Appellant.

Allowed this 13th day of June, 1929.
Carrington T. Marshall, Chief Justice of the Supreme Court of Ohio.

[fol. 11] [File endorsement omitted.]

[fols. 12-17] Citation, in usual form, showing service on Cyrus Locher, filed June 25, 1929, omitted in printing.

[fol. 18] IN SUPREME COURT OF OHIO

[Title omitted]

DOCKET AND JOURNAL ENTRIES

Transcript of Docket Entries, Memoranda of Pleadings, etc., Filed, Writs Issued, Judgments Decreed, and Orders.

1928.

Aug. 17. Petition in Error (as of right) & Waiver of Summons filed.

1928

Aug. 31. Court of Appeals transcript, common pleas court transcript and original papers filed.
Printed record and proof of service filed.

Sept. 19. Plaintiff's printed briefs (same as #21324) filed.
21. Proof of service of plaintiff's briefs filed.

Nov. 30. Deft's printed briefs (same as 21324) filed 12/1/28 proof of service filed.

Dec. 11. Plaintiff's printed reply briefs (same as 21324) filed.
14. Proof of Service of plaintiff's reply briefs filed.
20. Printed briefs, Amicus Curiae by George C. Hansen, (same as 21324) filed and sent to Court. 12/26/28 P. S. Filed.

1929.

Feb. 22. Printed briefs of Henderson, Quail, McGrew, & Morgan, Amicus Curiae, filed (same as 21324) 2/26/29 P. S. Filed.

Mar. 27. On Reargument, Judgment Affirmed. Journal #31 P. 614.

Apr. 3. Mandate Issued.
3. Original Papers Sent To Clerk.
26. Application for rehearing filed and sent to Court. Denied, June 5, J. 31.

May 25. Motion by plaintiff to vacate judgment and for judgment for plaintiff in error, briefs on motion, notice and proof of service filed.

June 5. Motion by plaintiff to vacate judgment and for judgment for plaintiff in error—Overruled Journal 31 Page 683.

June 13. Petition for allowance of appeal to Supreme Court of United States Filed.
Order allowing appeal filed. Assignment of error filed.
Bond in Sum of $500.00 signed by Pauline Wadsworth as principal, and Royal Indemnity Co. as Surety, filed and approved.

June 25. Citation, waiver and acceptance of service and entry of appearance filed.
Precipe for transcript and acknowledgment filed.

[fols. 19-21] Transcript of Journal Entries

1929.

Mar. 27. This cause came on to be heard upon the transcript of the Record of the Court of Appeals of Cuyahoga County and was argued by Counsel. On consideration whereof, it appearing that five members of this Court (Robinson, Jones, Matthias, Day and Allen, JJ) are of the opinion that Sections 2976-4, 2976-5, 2976-10, 2976-10c 2976-10e, 2976-10i of the General Code of Ohio are unconstitutional; that two members (Marshall C. J. and Kinkade, J.) are of the opinion that said sections are not repugnant to any constitutional provision; that the Court of Appeals held the said statutes constitutional, and that in such cases the Constitution of Ohio requires a concurrence of all but one of the members of the Supreme Court to declare a law unconstitutional, it is ordered and adjudged that the judgment of the said Court of Appeals be and the same hereby is affirmed, and it appearing to the Court that there were reasonable grounds for this proceeding in error, it is ordered that no penalty be assessed herein.

It is further ordered that the defendants in error recover from the plaintiff in error their costs herein expended taxed at $—.

Ordered, That a special mandate be sent the Court of Appeals of Cuyahoga County, to carry this Judgment into Execution.

June 5. It is ordered by the Court that this Motion be and the same is hereby, overruled.

June 5. It is ordered by the Court that application for rehearing in the above cause be and the same hereby is, denied.

[fol. 22] [File endorsement omitted]

[fol. 23] IN SUPREME COURT OF OHIO

[Title omitted]

MOTION TO VACATE JUDGMENT, AND FOR JUDGMENT FOR PLAINTIFF IN ERROR—Filed May 25, 1929

Pauline Wadsworth, a taxpayer, etc., plaintiff in error, respectfully moves the court to enter an order vacating and holding for naught the judgment heretofore entered upon the journal of this court, affirming the judgment of the Court of Appeals of Cuyahoga County in this cause, and to enter in lieu thereof a judgment reversing the aforesaid judgment of the Court of Appeals and remanding the cause to said court for further proceedings according to law; or to enter an order vacating and holding for naught the judgment heretofore entered on the journal of this court, affirming the judgment of said Court of Appeals, and to enter in lieu thereof a judgment of this court in favor of the plaintiff in error, in accordance with, and as prayed for in, her amended petition; or, failing either of said remedies, to modify the judgment of this court by certifying to the ex-
[fol. 24] istence of a Federal question or questions upon this record and to the court's action thereon.

Plaintiff in error further says that she began this action as a taxpayer in the Common Pleas Court of Cuyahoga County against the defendants in error, seeking injunction and other equitable relief and alleging, among other things, (a) that the Park District Act § 2976-1 et seq., G. C., is invalid as being in violation of the Constitution of Ohio, the Constitution of the United States, and that certain sections of said Park District Act violate certain provisions of said Constitutions that are specifically pointed out in her amended petition; (b) that defendants in error had contracted to purchase land for a large sum upon which there were no natural resources which could be conserved if purchased; (c) that the Auditor of Cuyahoga County did not furnish the certificate required by § 2976-10 G. C.; (d) that defendants in error had been and were expending public funds for purposes not authorized by the Park District Act or any section thereof; (e) that §§ 2976-10g and 2976-10h,

G. C., are unconstitutional and void. The defendants in error filed an answer to plaintiff in error's amended petition, to which were attached certain interrogatories for them to answer, one being,

"Tenth Q. What are the natural resources upon the John Huntington property described in the petition, that will be conserved by the Park Board Commissioners acquiring said described lands?"

which they answered as follows, towit:

"A. Its adaptability for general public recreational uses, by reason of its location, topography, and lake frontage."

[fol. 25] Said cause was heard by the Common Pleas Court of Cuyahoga County, which dismissed plaintiff in error's amended petition and rendered judgment for defendants in error; whereupon the plaintiff in error appealed this cause to the Court of Appeals of Cuyahoga County which made separate findings of fact and of law as requested; and inter alia found, first, that the Auditor of Cuyahoga County did not furnish a certificate that the funds were in the treasury to pay for the land which plaintiff in error asked that the defendants in error be enjoined from buying; second, that defendants are and were expending public funds (a) for building an artificial lake or dam, (b) for attorney fees, (c) for taxicab and trucking; and said Court of Appeals for its conclusions of law affirmed the judgment of the Common Pleas Court upholding said Park District Act. (R. 29-37.)

Thereupon, plaintiff in error filed a petition in error of right in this court, and, after the submission of briefs and two arguments, this court on March 27, 1929, affirmed said judgment. This was accomplished by the concurrence of two members of this court holding that the Park District Act is constitutional, with five judges non-concurring.

Plaintiff in error contends that this court, like the lower courts, failed to pass specifically upon the constitutionality of §§ 2976-10g and 2976-10h of the General Code, or to determine whether defendants in error were about to expend public funds contrary to the provisions of the act in question, or were acting in violation of the provisions of the Ohio and Federal Constitutions, or whether said Park Dis-

trict Act, or any of its provisions, violates the Federal Constitution or any of its provisions; and the court fails to state in its journal entry that no federal question is pre-[fol. 26] sented, decided or involved in this controversy.

This action of the court in affirming the judgment of the Court of Appeals in this cause upon the vote of but two of its members, notwithstanding that five of its members nonconcurring and constituting a majority of the entire court considered the Park District Act to be unconstitutional, is erroneously predicated upon the following provision of Section 2 of Article 4 of the Constitution of Ohio:

"No law shall be held unconstitutional and void by the Supreme Court without a concurrence of at least all but one of the judges, except in the affirmance of the judgment of a court of appeals declaring a law unconstitutional and void."

The opinion herein declares that this Court has given no consideration to G. C. §§ 2976-10g and 2976-10h, the record disclosing no attempt or purpose of the Cleveland Park Board to enact by-laws, etc., defining offenses or to prosecute violators thereof, or to empower agents to make arrests, but that the attention of the court has been confined to §§ 2976-4, 2976-5, 2976-9, 2976-10, 2976-10c, 2976-10e, and 2976-i, thus ignoring, among other provisions of the Act, § 2976-7 empowering such board "to acquire lands either within or without such district", and § 2976-10h requiring that before any contract or outlay can lawfully be made, the county auditor shall certify that there is unappropriated money in the treasury sufficient to cover the same. Hence arise the following—

Grounds for Rehearing

First. The amended petition in the Cleveland case alleges (R. 9, 15-16) that the Board has expended large sums of money without warrant of law in the development of its parks and will continue to expend public funds unlawfully and for the purposes, among others, of employing "engineers, draftsmen, care-keepers and useless supernumeraries", and to "pay keepers or persons put in charge there-[fol. 27] of", for which purposes its power is limited by G. C. § 2976-6 to the employment of "a secretary and such

other employees as may be necessary in the performance of the powers herein conferred", and is further defined by G. C. § 2976-10h which provides that "Such employees as the Board of Park Commissioners may designate for that purpose shall have and may exercise all the powers of police officers within and adjacent to the lands under the jurisdiction and control of said Board". The answer admits the acquiring of much real estate "for the purpose for which said Board is by law authorized to acquire lands". It is thus only by arbitrary construction that there can be predicated of this record a non-disclosure of the Cleveland Board's continuing expenditure of money and designation of employees to keep and care for its large areas of park lands in the way authorized by the Act, namely, by exercising the "powers of police officers". Furthermore, this court is long since committed to the proposition that a tendered issue of the unconstitutionality of a law is not moot but must be adjudicated, even though a concrete case of actual or intended transgression of the asserted constitutional limitation has not yet arisen in the administration of such law. State, ex rel. Pogue, v. Groom, 91 O. S. 1, 8; 12 C. J. 786, note 78.

Secondly. The amended petition alleges, and it is conceded, that the Cleveland Park Board has acquired lands, "about 400 acres being in Lake County", wholly outside the Park District, and "now has pending condemnation actions to acquire land therein" (R. 14), and has been and is "expending large sums of money, without warrant", for these and other purposes. Thus, the consideration of this court was clearly challenged, but was not accorded, to the asserted unlawfulness of taxing the inhabitants of the village and county of plaintiff's residence, within the district, for the acquiring of park lands elsewhere.

[fol. 28] Thirdly. The amended petition also alleges, and it is expressly found by the Court of Appeals (R. 9, 36-37), that a certain contract of the Cleveland Park Board with The Union Trust Company for the acquiring of a large tract of land in Cuyahoga County had been partly carried out and was being fully consummated without the County Auditor's certificate of funds available to pay the cost. This point was also improperly ignored. Besides these omissions to adjudicate issues tendered, this court has erred in its judgment—

Fourthly. The judgment here denies to plaintiff in error, in the construing of this Act and the disposing of this cause, the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment of the Constitution of the United States, which the amended petition expressly invoked (R. 17) in respect to the unequal operation of the Act in subjecting (among its other inequalities) the taxpayers within the district to the financial burden of acquiring and maintaining lands outside of it, and the same constitutional guaranty is now further invaded by the rendering of judgment against this plaintiff in error by the concurrence of a minority—less than a quorum—of this Court upon said Federal question, and by the Court's failing to state in its journal entry that such Federal question was presented and was so adjudicated by such minority.

Fifthly. The entering by this Court of a minority judgment upholding the constitutionality of a law which the judgment of the Court of Appeals has sustained, when a contrary judgment by another Court of Appeals may at the same time be affirmed here by the same vote, is a peculiarity of the Ohio Constitution and of the judicial structure of this State, which necessarily denies to litigants the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment to the Federal Constitution above [fols. 29-32] cited, and by Section 4 of Article 4 of the same instrument which assures to each state a republican form of government. Cf. Board of Education v. City of Columbus, 118 O. S. 295; The Federalist, No. 43. To these provisions of the Constitution of the United States as the supreme law of the land, this anomalous and inconsistent provision of the Ohio Constitution must yield and judgment herein be rendered by majority rule. This applies not only to the determining of the repugnance of the Act to the Ohio Constitution, but a fortiori to the testing of such act under the Constitution of the United States which may and must be adjudicated by the majority of this Court.

Wherefore plaintiff in error prays for a rehearing and for the relief hereinbefore specified.

George D. Hile and Snyder, Henry, Thomsen, Ford & Seagrave, by Frederick A. Henry, Attorneys for Plaintiff in Error, State of Ohio ex Rel. Pauline Wadsworth.

[fol. 33] IN SUPREME COURT OF OHIO

(Nos. 21324 and 21336—Decided March 27, 1929)

THE STATE ex Rel. BRYANT v. AKRON METROPOLITAN PARK DISTRICT FOR SUMMIT COUNTY et al.

THE STATE ex Rel. WADSWORTH, a Taxpayer,

v.

ZANGERLE, AUD., et al.

Error to the Court of Appeals of Summit County. Error to the Court of Appeals of Cuyahoga County

Constitutional law—Park district act—Section 2976-1 et seq., General Code—Constitutionality affirmed by two Judges of Supreme Court—Legislative powers not delegated to administrative bodies—Political and executive powers not delegated to judicial officers—Appointive officers may levy taxes.

The facts are stated in the opinion.

Mr. Geo. D. Hile and Messrs. Snyder, Henry, Thomsen, Ford & Seagrave, for plaintiffs in error.

Messrs. Myers & Dinsmore and Mr. O. A. Hunsicker, for defendants in error in No. 21324.

Mr. Edward C. Stanton, prosecuting attorney, Mr. E. J. Thobaben and Messrs. Locher, Green & Woods, for defendants in error in No. 21336.

[fol. 34] OPINION

MARSHALL, C. J.:

These two error proceedings, filed in this court as of right, involve the same or similar questions of constitutional law, and have therefore been argued together and will be disposed of in one opinion. Each was begun as a taxpayer's suit, attacking the constitutionality of the Park District Act, General Code Sections 2976-1 to 2976-10c, inclusive (107 O. L., 65-69), and the amendments thereto, Sections 2976-1 and 2976-7, and the supplemental Sections 2976-10d to 2976-10i (108 O. L., pt. 2, 1097-1100). Inci-

dentally, the litigation in each instance involves questions of the lawful existence of the two metropolitan park boards organized under and pursuant to said statutes, in Cleveland and Akron, respectively.

In cause No. 21324, here on error from the Court of Appeals of Summit county, that court had affirmed the judgment for the defendants pronounced in the court of common pleas upon the pleadings, which joined issue upon the constitutional objections alleged by the taxpayer against said statutes. In cause No. 21336, here on error from the Court of Appeals of Cuyahoga county, that court heard the case on appeal from the court of common pleas of that county and rendered judgment for the defendants, with separate findings of fact and conclusions of law. In each case, the prayer of the petition was that the officers of the district park boards be enjoined from incurring obligations requiring the expenditure of public funds, or from exercising any of the powers conferred upon them by said statutes, and, more especially, that they be enjoined from levying any taxes upon property within the respective park districts, on the ground that all such statutes were unconstitutional and void.

[fol. 35] Section 2976-1, as amended, provides for park districts for the conservation of the natural resources of the state, and further provides that such districts may include all, or a part only, of the territory within a county, if existing townships or municipalities are not divided.

Section 2976-2 provides that application may be made to the probate judge to create a park district, which application shall state the name of the district, contain accurate descriptions of the territory to be included, and be accompanied with an accurate map or plat.

Section 2976-3 provides for notice of the time of hearing such application.

Section 2976-4 provides for the hearing and taking evidence, as in other civil cases in said court and provides that, if the judge finds that the creation of such district will be conducive to the general welfare, he shall enter an order creating the district under the name specified in the application.

Section 2976-5 provides that upon creation of such district the probate judge shall appoint three commissioners, who shall take oath and give bond, and who shall serve

without compensation, except the allowance of actual and necessary expenses.

Section 2976-6 provides that such board shall be a body politic and corporate and shall be capable of suing and being sued.

Section 2976-7 confers upon such board power to acquire "lands either within or without such district for conversion into forest reserves and for the conservation of the natural resources of the state, including streams, lakes, submerged and swamp lands, and to those ends may create [fol. 36] parks, parkways, forest reservations and other reservations and afforest, develop, improve and protect the same in such manner as they may deem conducive to the general welfare. Such lands may be acquired by such board, on behalf of said district, by gift or devise, by purchase, or by appropriation."

Section 2976-8 authorizes such park board to take control of any municipal park or park lands within the district by agreement with the authorities controlling the same.

Section 2976-9 provides: "In the development and improvement of the lands acquired by the board, such board may assess such portion of the cost of such development or improvement as it may deem equitable, not, however, in excess of fifty per cent of such total cost, upon abutting, contiguous, adjacent or otherwise specially benefited lands, in an amount not in excess of and in proportion to the special benefits conferred upon such lands by such development or improvement. Such assessments shall be payable in not to exceed ten equal annual installments, and said board may borrow money in anticipation of the collection of such special assessments, and the proceedings had in the levying and collection of such special assessments, including the issue of bonds of such district in anticipation of the collection of deferred assessments, shall be as provided in case of the levy and assessment of special assessments for street improvements in municipalities, in so far as such proceedings shall be applicable."

Section 2976-10 provides: "Such board shall have power to levy taxes upon all the taxable property within such district in an amount not in excess of one-tenth of one mill [fol. 37] upon each dollar of the assessed value of the property in the district in any one year, subject, however, to the combined maximum levy for all purposes otherwise

provided by law. After the budget commission of the county in which said district is located shall certify such levy, or such modification thereof as they deem advisable to the county auditor, it shall be by him placed upon the tax duplicate, and the board may then borrow money in anticipation of the collection of such tax, and issue the negotiable notes of such board therefor in an amount not in excess of seventy-five per cent. of the proceeds of such tax, based upon the amount of the current tax duplicate. Such notes shall not be issued for a period longer than one year, and shall be payable out of the proceeds of such levy, and to the extent of such notes and the interest which may accrue thereon, such levy shall be exclusively appropriated to the payment of such notes, and shall be used for no other purpose whatsoever. Any portion of such notes remaining unpaid through any deficiency in such levy, shall be payable out of the next ensuing levy which shall be made by said board in the next ensuing year in an amount at least sufficient to provide for the payment of said notes, not, however, in excess of one-tenth of one mill."

Section 2976-10a provides for the disposition of records, surveys, and other property, including treasury balances required by laws superseded by these acts.

Section 2976-10b provides for the custody, accounting, depositing, and disbursement of park board funds, and requires the auditor's certificate of money in hand to provide [fol. 38] for contracts before becoming effective.

Section 2976-10c provides for removal of commissioners at the discretion of the probate judge, either upon complaint filed or upon his own motion, and for the appointment of successors.

Section 2976-10d provides for annexation to a park district of territory adjacent and contiguous thereto, whether located within or without the county wherein such district was created.

Section 2976-10e provides, in case of annexation to a park district of territory located in a county other than a county in which such district was created, the budget commissioners of the county in which such annexed territory is located shall exercise, with reference to such annexed territory, the powers conferred upon budget commissioners by Section 2976-10, and the auditor and treasurer of the county in which such annexed territory is

located shall exercise, with reference to taxes levied and collected by the park board upon such annexed territory, the powers conferred upon auditors and treasurers by Section 2976-10b.

Section 2976-10f provides that park boards may sell lands on approval by the probate judge.

Section 2976-10g gives to such boards power to adopt by-laws, rules, and regulations, and further provides that the violation of any such by-laws, rules, and regulations shall constitute a misdemeanor punishable by fines.

Section 2976-10h provides that such employes of the board as may be designated for that purpose shall have and exercise the powers of police officers within and adjacent to the lands under the jurisdiction and control of the board.

[fol. 39] Section 2976-10i provides: "Upon or before the first day of September in any year the board of park commissioners, by resolution, may submit to the electors of the district the question of levying taxes for the use of the district. Such resolution shall declare the necessity of levying such taxes, shall specify the purpose for which such taxes shall be used, the annual rate proposed, and the number of consecutive years such rate shall be levied; and such resolution shall be forthwith certified to the board of deputy state supervisors and inspectors of elections in each county in which any part of such district is located, and the question of the levy of taxes as provided in such resolution shall be submitted to the electors of the district at the next ensuing general election. The ballot shall set forth the purpose for which said taxes shall be levied, the annual rate of levy, and the number of years of such levy. If a majority of the electors voting upon the question of such levy shall vote in favor thereof, such taxes shall be levied and shall be in addition to the taxes authorized by Section 2976-10 of the General Code, and all other taxes authorized by law; provided that the rate submitted to the electors at any one time shall not exceed one-tenth of one mill annually upon each dollar of valuation. When a tax levy shall have been authorized as herein provided, the board of park commissioners may issue bonds in anticipation of the collection of such levy, provided that such bonds shall be issued only for the purpose of acquiring and improving lands; and such

levy, when collected, shall be applied in payment of the bonds so issued and the interest thereon; provided further [fol. 40] that the amount of bonds so issued and outstanding at any time shall not exceed one per cent of the total tax valuation in such district. Such bonds shall bear interest at a rate not to exceed six per cent per annum, shall be signed by a majority of the members of such park board, and shall be sold in the manner specified by law for the sale of municipal bonds, except that before advertising such bonds for sale at public sale, it shall be necessary only to offer said bonds for sale to the Industrial Commission of Ohio as provided by law."

While the petitions attack the constitutionality of Sections 2976-10g and 2976-10h, we shall give no consideration to those sections, because it does not appear that either of the boards involved in these error proceedings has ever attempted to enact by-laws, rules, and regulations, or to constitute any of their employees police officers, or to prosecute violators of said by-laws, rules, and regulations. The provisions particularly challenged and to which we shall direct our attention are Sections 2976-4, 2976-5, 2976-9, 2976-10, 2976-10c, 2976-10e, and 2976-10i.

There can be no question of the power of the General Assembly to establish park districts and boards of park commissioners, and to define their powers. No one would question the right of the General Assembly to levy a state tax to establish and maintain state parks and reserves, and to appoint commissioners to care for them. This right has freely been exercised in the past. These are institutions in which all the people of the state are presumably interested and by which they are benefited. Cities have freely exercised these rights, and the state has likewise, though rather sparingly, exercised them. District parks and boards of [fol. 41] park commissioners are institutions which differ from state institutions only in the range of the interest and benefit. By the legislation now under consideration provision has been made for park districts, whose benefits are more general than those of the cities and more local than those of the state. The power of the General Assembly to establish any of them is no longer doubted. This proceeding does not question the power of the Legislature to establish park districts. The attack is upon the methods by which they are established, and by which park boards

are created, and upon the powers conferred on them. The case of McNab v. Board of Park Comm'rs, of Metropolitan Park Dist. in Cleveland, 108 Ohio St., 497, 141 N. E., 332, held that the statutes under which the Cleveland Park Board was established were enacted under the broad legislative power conferred upon the General Assembly and in the exercise of the state's general police power, and the only consideration given in that case to Section 36 of Article II of the Constitution, (the amendment of 1912), was to declare that that amendment did not operate as a limitation upon general legislative power. The discussion of the state's police power in the opinion in that case need not be further elaborated here. While the syllabus in that case was a sweeping declaration of the constitutionality of the statutes which are challenged in the instant case, it is proper to state that a different angle of attack is here made. This proceeding challenges the constitutionality of the various statutes because of alleged delegation of legislative powers to executive bodies, and alleged delegation of political and executive powers to judicial bodies. The first [fol. 42] challenge we shall notice is directed to the power conferred upon the probate judge to appoint park commissioners and to exercise the functions of molding the confines of the area affected and erecting the same into a park district. It is alleged that the appointing power is an executive function, and the establishment of the confines of the district a legislative function, and that both are nonjudicial.

The Constitution of Ohio has delegated to the General Assembly the legislative authority of this state. This authority is only subject to the express limitations found in the Constitution itself and the implied limitation that it must fall within the scope of legislative authority, as distinguished from judicial and executive authority conferred upon other departments. Except for the provisions relating to the initiative and referendum, all legislative authority of the state must be exercised by the General Assembly alone.

The essential principle underlying the policy of the division of powers of government into three departments is that powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments, and further that none of them ought to possess directly or indirectly an overruling

influence over the others. It was declared by Madison before the adoption of the United States Constitution: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." To provide a practical security for each against the invasion [fol. 43] of the others was felt by the early founders of our government to be a most important, as well as a most difficult, task. The State Constitutions of many of the states, adopted immediately after the federal Constitution went into effect, declared in strong terms that the powers of government ought to be forever separate and distinct from each other, and yet not one of them faithfully observed its own solemn injunctions, but made provision for certain powers to be exercised by departments other than those to which they properly belonged. Other states, including Ohio, and the federal government, made no such declaration, and while the powers have in fact been assigned to the three departments, no barriers have been provided between them, and no injunction declared against invasions or surrenders.

Our own Constitution contains many instances of conferring powers upon departments foreign to their true classification. The Constitution of 1802 provided for judges to be chosen by the Legislature. Our present Constitution gives to the Governor the veto power. The Lieutenant Governor presides over the Senate. The House of Representatives has the sole power of impeachment, and impeachments must be tried by the Senate. The Governor may convene the General Assembly in extraordinary session and limit the deliberations of such session. In case of disagreement between the two houses, he may adjourn them. The executive prerogative of pardon is in cases of treason reserved to the General Assembly. These major instances, and others of a minor nature which might be mentioned, illustrate and demonstrate the mixture of powers which is not only tolerated, but expressly authorized. It was the purpose of the [fol. 44] founders of our federal and state Constitutions to so balance the division of powers that each department would possess the constitutional means of resisting encroachments of the others, and, at the same time, to so divide and arrange the offices that each might be a check on the others.

In the instant case it is not complained that one department is attempting an invasion of the prerogative of another, but that the Legislature is voluntarily surrendering a part of its prerogative to the judiciary, and conferring both legislative and executive powers upon the judicial branch. It cannot be doubted that the Legislature may define the jurisdiction of the probate court; nor is it claimed that it may not. This is placed beyond argument by the clear language of Section 8 of Article IV of the Constitution. It is claimed, however, that the probate court is clothed with authority to determine the extent of the territory to be created into a park district and that this is a purely political question. Sections 2976-2 to 2976-5, inclusive, define the powers and procedure of the court. Application must be made, notice given, and a hearing had. Section 2976-4 provides:

"At such hearing evidence may be taken as in other civil cases in said court, and the judge shall hear all arguments for and against the creation of such district. If he shall find that such application is signed, or authorized, as herein provided, and that the creation of such district will be conducive to the general welfare, he shall enter an order creating the district under the name specified in the application."

[fol. 45] It is manifest, therefore, that the function of the court is in every sense judicial. It involves fact finding, and application of statutory principles and policies to the facts found. It is true that the policy of establishing parks and conserving natural resources is a purely political and therefore a legislative matter, but the question of existence of natural resources in any proposed district, and the further question of reasonable relation of proposed parks and natural resources to the general welfare, are justiciable matters.

It is further asserted that Section 2976-5, conferring upon the probate court power to appoint the commissioners, is unconstitutional because it confers an executive function upon the court. We have already seen that the Constitution places no barrier between the departments and there is no definite limitation of the general legislative authority which forbids giving to courts the power of appointment. On the other hand, there is very definite dele-

gation of express power in that behalf. Section 27 of Article II provides:

"The election and appointment of all officers, and the filling of all vacancies, not otherwise provided for by this Constitution, or the Constitution of the United States, shall be made in such manner as may be directed by law. * * *."

The office of park commissioner is, of course, not provided for by the Constitution, and therefore becomes subject to legislative action. The Legislature has acted pursuant to this authority many times. The appointing power has been conferred upon the court of common pleas in the following instances: Sections 5868 and 5869, to appoint and [fol. 46] license auctioneers and to determine the amount of the license, not in excess of $500; Section 2976-11, to appoint county library trustees; Section 2710, to appoint examiners of the county treasury; Section 5947, to license ferries; Section 2333, to appoint county building commissions; Section 15098, as amended 109 Ohio Laws, 354, to appoint trustees of the Cincinnati Southern Railway; by the Conservancy Act (104 Ohio Laws, 13; Section 6828-8, General Code), to appoint directors of conservancy districts.

The power of appointment has been conferred upon the probate courts in the following instances: Section 2791, to appoint a board of county visitors; Section 2397, to appoint, in conjunction with the county auditor and county recorder, a county commissioner; Section 2578, to examine as to grounds of removal of the county auditor; Section 2714, in conjunction with county treasurer and county auditor, to determine the necessity for a night watchman for the treasury and to fix his compensation; Section 1662, to appoint probation officers; Section 2348, to participate in the approval of plans for a courthouse or jail; Section 1713, to add one or more justices of the peace to any township.

If this court should hold at this time that the probate court does not have power to make appointments, and that the Legislature has no authority to confer such power upon the probate court, we would by the same token hold all of these statutes to be unconstitutional and void. We have no difficulty in declaring that, by virtue of Section 27 of Article II of the Constitution, the Legislature has authority to confer the appointing power upon courts, the jurisdiction

[fol. 47] of which is under the authority and control of the Legislature, and this, of course, includes probate and common pleas courts.

The second challenge we shall notice is directed to the power conferred upon the board of park commissioners to levy taxes upon the taxable property within the district, not exceeding one-tenth of a mill in any one year. It is claimed that this is an attempted delegation of legislative power, vested exclusively, by Section 1 of Article II of the Constitution, in the General Assembly. . It is a maxim in constitutional law that power conferred by a Constitution upon a Legislature to make laws cannot be delegated by such body to any other body or authority, unless the authority to so delegate is given by the Constitution itself, either expressly or by implication. The legislative prerogative is one which involves judgment, wisdom, and discretion of a high order, and the trust thus imposed cannot be shifted to other shoulders; neither can the judgment and discretion of any other body be substituted for that of the Legislature itself.

This principle is well settled and is no longer the subject of controversy. Its application is one of the greatest difficulty in certain classes of cases, more especially in legislation involving the exercise of the police power.

In the complexity of our advancing civilization, in the wide differences in conditions in different localities in the same state, and in the ever-changing conditions in a given locality, the Legislature has found it necessary to content itself with declaring the principles governing a general public purpose, and to confer upon existing local officials, [fol. 48] or upon local boards to be created in a designated manner, the authority to provide, within definite limitations, rules and regulations to execute the general purpose expressed in the law itself. It does not argue against the completeness of the law that a given locality or district may or may not at its option avail itself of the provisions of the law. Statutes are sometimes peremptory and mandatory, and sometimes optional and permissive. One locality may have no need of governmental activity along a given line, while another locality in the same state may have an urgent need. That need must be ascertained and declared by means and methods prescribed by the law itself, which must be scrupulously followed. While the Legislature may

not delegate to any other power the right to declare principles and standards, or general public policy, it may delegate to other competent agencies the power to determine whether or not they will avail themselves of the privileges conferred, and also delegate to certain named executive or administrative agencies authority involving discretion in relation to the execution of the law.

The Legislature having declared the governmental policy, and having fixed the legal principles which are to govern, an adminstrative agency may be given power to ascertain the facts and conditions to which the policies and principles apply.

The creation of boards and commissions has become a familiar means in recent periods to perform the executive functions which are essential to the administration of laws. Parks and reservoirs for conservation of natural resources are for the public welfare, and the general policy of creat- [fol. 49] ing them and the methods of doing so, are subject-matters of legislation. It is axiomatic that they cannot be created or maintained without the expenditure of money. Not being in that class or character of public improvement where assessments can be made upon property in the vicinity by reason of special benefits, that method of providing funds is not available. Manifestly a levy of taxes upon all the property in the state cannot be made to create and maintain a district park. It is inevitable, therefore, that a district levy must be made, and the Legislature has in fact authorized district park boards to impose a levy not in excess of one-tenth of one mill upon the assessed value of all taxable property in the district, subject to the maximum levy for all purposes provided by law.

Applying the principles already declared, the Legislature has determined the general policy and defined the methods by which local needs can be determined by orderly processes. As a part of such methods and processes it has conferred upon the district board the power to determine the financial needs of the district and to make levies of taxes to meet them. We are concerned with the constitutionality of the power thus delegated.

The power of the state to levy and collect taxes for public purposes is indispensable to orderly government, and is inherent in sovereignty. No government could discharge its functions without funds, and funds can only be raised by

the imposition of taxes. The exercise of the power of imposing and collecting taxes is legislative, and yet this power is not expressly conferred by our Constitution upon [fol. 50] the General Assembly. It is, however, necessarily included in the legislative authority conferred upon the General Assembly by Section 1 of Article II of the Constitution. Except for other express and implied provisions in the Constitution, the power of taxation would be vested in the Legislature alone, and without interference on the part of other governmental agencies. When these express and implied powers have been ascertained, the problems of the instant case will have been solved. The following provisions of the Constitution are pertinent to the inquiry:

Article VI, Section 2: "The General Assembly shall make such provisions by taxation, or otherwise, as, with the income arising from the school trust fund, will secure a thorough and efficient system of common schools throughout the state."

Article X, Section 7: "The commissioners of counties, the trustees of townships, and similar boards, shall have such power of local taxation, for police purposes, as may be prescribed by law."

Article XII, Section 5: "No tax shall be levied, except in pursuance of law; and every law imposing a tax, shall state, distinctly, the object of the same, to which only, it shall be applied."

Article XIII, Section 6: "The General Assembly shall provide for the organization of cities, and incorporated villages, by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit, so as to prevent the abuse of such power."

Cities and villages in Ohio have in fact been organized under general laws, and the Legislature has in fact enacted statutes relative to the levy and collection of taxes by mu- [fol. 51] nicipal corporations, which provisions are found in Sections 5625-3 and 3785, General Code. In harmony with the provisions of Section 6 of Article XIII of the Constitution, the provisions of the statute are in the nature of restrictions, thereby carrying out the constitutional mandate. By the provisions of Section 2 of Article VI of the

Constitution the General Assembly was required to establish a thorough and efficient system of common schools throughout the state, and again there was the necessary implication that those local agencies in charge of the schools should have the power to impose and collect taxes. Counties and townships had been established as political subdivisions long before the adoption of the Constitution of 1851, and the same political necessity required the adoption of Section 7 of Article X, giving power of local taxation for police purposes to such subdivisions, but nevertheless requiring that such power should be only such "as may be prescribed by law."

All of these governmental agencies being local in their nature, it would have been impracticable, not to say impossible, for the General Assembly to have determined the amounts necessary to be provided by taxation; but, aside from that fact, the general policy of local control of local institutions has been a settled one in the genius of American government from its very foundation. The power of taxation is therefore a soverign power and a legislative power, but the exercise of that power calls for certain administrative functions as indispensable to a wise and economical administration of public affairs. It is therefore the province of the General Assembly to determine the general governmental policy and the maximum of the [fol. 52] extent of the imposition and collection of taxes for all purposes in the state; but it is the province of the local subdivisions to determine their local needs, and to distribute the parts composing that maximum among the several institutions to be created and maintained. All of these principles have been well settled, and, while numerous authorities might be cited in their support, it is only necessary to refer to a few leading cases: Hill v. Higdon, 5 Ohio St., 243, 250, 67 Am. Dec., 289; Western Union Tel. Co. v. Mayer, Treas., 28 Ohio St., 521, 533; City of Cincinnati v. Roettinger, 105 Ohio St., 145, 154, 137 N. E., 6.

If park districts fell clearly within the political subdivisions referred to in the Constitution, the foregoing principles would be decisive of this controversy. It is claimed, however, by relators, that several differences distinguish them. It is claimed that, by reason of the fact that in all those political subdivisions particularly referred to in the Constitution public officers are elected by vote of the peo-

ple, it necessarily follows that taxes can only be levied by local authorities where the local officials are elected by the vote of the people. We are not, however, able to find any provision in the Constitution which limits the power to levy taxes to elected officials, as distinguished from those who are appointed to office. We are unable to find that the Constitution makes any distinction between officers elected and officers appointed, so far as the powers to be conferred upon them are concerned. The Constitution does provide, in Sections 2 and 4 of Article X, that all township and county officers must be elected, but Section 27 of Article II provides that all officers not provided for by the Consti- [fol. 53] tution may be either elected or appointed, as the Legislature may direct. Taxes could only be imposed and collected for the use of townships and counties by officers who are elected by the people, for the simple reason that townships and counties can only choose their officials by election. It does not follow that, if any other political subdivisions are created in a lawful way, the officers who would govern such political subdivisions might not hold their offices by appointment, under the provisions of Section 27 of Article II. Neither does it follow that such officers could not be charged with the duty and responsibility of levying the taxes necessary to carry on the functions of such subdivisions.

To reach this conclusion it is not necessary to resort to implication. In the same section which makes provision for the power of local taxation for townships and counties, we find that that power has been conferred upon "similar boards;" that is to say, boards which are similar as governmental agencies to trustees of townships and commissioners of counties. They would necessarily not be boards which would have their territorial jurisdiction identical with a township or a county, because this would necessarily constitute them either township or county officers. In such event, it would have been necessary that they be elected by a vote of the people, and there would be no problem to be solved. The Constitution framers must have had some particular agency in mind, and we can conceive of no agencies which would have been pertinent to the language used except boards which would have jurisdiction over some territorial district not identical with a township or a county. [fol. 54] Adopting this view of the matter, we are not

without abundant authority to support the conclusions we have reached.

Park boards are strictly creatures of legislation. But this fact does not distinguish them from townships and counties, which are likewise creatures of legislation. It was clearly and emphatically so stated by Judge Ranney in Cincinnati, W. & Z. Rd. Co. v. Commrs. of Clinton County, 1 Ohio St., 77, at page 89 of the opinion:

"But what is a county? It is not imperium in imperio, in any sense. It is invested, as such, with no single attribute of sovereignty; and for reasons already stated, it cannot be. Rightly considered, it is a mere instrumentality, a means in the hands of the legislative power to accomplish its lawful purposes; and to this extent, a creature in the hands of its creator, subject to be molded and fashioned as the ever varying exigencies of the state may require."

Much more appears in that opinion of the same tenor. This language, coming as it does from Judge Ranney, who was the leading figure in the constitutional convention of 1851, becomes authority of unusual force. In the same opinion he quotes with approval from Rice v. Foster, 4 Har. (Del.), 479, 495, as follows:

"Legislative power is the power of making laws. The making of a law, prescribing by what persons, or by what body, when, and in what manner taxes should be laid and collected, is the exercise of a legislative power. But the making of a resolution, or order, or the determination or direction by the persons or body appointed for such pur- [fol. 55] pose by the law, that taxes shall be laid and collected, is simply the execution of an authority granted by statute."

In the same opinion he quotes with approval from Parker v. Commonwealth, 6 Pa., 507, 47 Am. Dec., 480:

"A law designating the persons, or bodies of persons, by whom a tax may be imposed, and the mode in which it shall be collected and distributed, requires the authority of the constitutional law maker, for it is a rule of action prescribed. But the act of the designated persons or bodies,

depends, for its authority, altogether upon the law commanding or permitting it."

Surely the Legislature has the same power to create districts as it has to create townships and counties. Judge Ranney's definition of a county has no point of difference as an instrumentality of government from the districts created by the acts now under consideration. We could not uphold the contentions of the relators in these cases without doing violence to the principle declared by this court in Miami County v. City of Dayton, 92 Ohio St., 215, 110 N. E., 726.

It is true that the Conservancy Act has many essential differences from the Park District Act, and it is true that under the Conservancy Act provision is made for assessments upon lands in the vicinity to defray the cost of the improvement, and it is true that in that case the court treated all levies of taxes as special assessments. The Conservancy Act does make provision for special assessments and it seems to us that it has also clearly made provision for levy of general taxes without regard to special [fol. 56] benefits. Section 43 of the act (Section 6828-43, General Code), contains the following provision:

"As soon as any district shall have been organized under this act, and a board of directors shall have been appointed and qualified, such board of directors shall have the power and authority to levy upon the property of the district not to exceed three-tenths of a mill on the assessed valuation thereof as a level rate to be used for the purpose of paying expenses of organization, for surveys and plans, and for other incidental expenses which may be necessary up to the time money is received from the sale of bonds or otherwise."

The "assessed valuation thereof" must necessarily refer to the value of property assessed for purposes of general taxation, and cannot possibly refer to the "appraisal of benefits" referred to in other portions of the act. We agree with the conclusions reached by the court in that case, but in order to do so do not find it necessary to make any distinction between the power to levy general taxes and the power to levy special assessments. The Miami conservancy case was before this court a number of times,

and every feature of the Conservancy Act was brought in question in those various proceedings, and all were found to be valid and constitutional. The same principle must necessarily apply to the Park Board Act, and those principles which have become a rule of property in conservancy cases cannot upon any equitable principle be denied application to cases arising under the Park Board Act.

In State, ex rel. Village of Cuyahoga Heights, v. Zangerle, 103 Ohio St., 566, 134 N. E., 686, this court had [fol. 57] under consideration the Health District Law, 108 Ohio Laws, pt. 2, 1085 (Section 1261-16 et seq., General Code). That law provided for local health districts and general health districts. The general health district was not identical in territory with any other political subdivision of the state. The law did not definitely provide for a levy of taxes to carry on the health activities of the district, but it did provide in Section 1261-40 that the board of health of a general health district should estimate the amounts needed for the current expenses of the district and submit the same to the budget commissioners, and further provided: "The aggregate amount as fixed by the budget commissioners shall be apportioned by the county auditor among the townships and municipalities composing the health district on the basis of taxable valuations in such townships and municipalities." The section further provided that the required amount should be withheld by the several auditors of the counties of the district, and the results were therefore the same as though the tax had been directly levied by the board, the auditor having no alternative except to withhold the amount requested and place the same in the "district health fund."

In State, ex rel. Fritz, v. Gongwer, 114 Ohio St., 642, 151 N. E., 752, this court had under consideration the District Ditch Law. (Sections 6536 to 6542, inclusive, General Code.) That law did not permit of a levy of general taxes, but made provision for special assessments. The assessments were made by elective officers, viz., the commissioners of the counties, the whole or parts of which composed the taxing district. It was held in that case that the law [fol. 58] was constitutional, and it was particularly stated that the county commissioners, while acting under that law, were not acting as county commissioners, but as offi-

cers of the entire territory composing the taxing district. While no provision was made in that law for a direct levy of general taxes, it did permit the pledging of the faith and credit of the special taxing district as security for bonds to be issued, and it necessarily follows that, if there were at any time default in any bond issued by any such district, and a liability thereon which could not be met by the special assessments, the residue would have to be met by a general levy of taxes on all of the property within the district. That decision is therefore authority for the doctrine that a levy of general taxes may be made by district officers who hold their offices ex officio, and therefore by appointment.

Counsel for relators interpret the Miami and Gongwer cases as giving to appointive officers only the power to levy special assessments. Even if we should adopt that limited interpretation of those cases, they would still be authority for the proposition that appointive officers might be empowered to levy general taxes, because we find nothing in the Constitution which places special assessments upon a different basis from general taxes. The Constitution provided that certain officials must be elected by vote of the people, and then provides that other officers than those named may be either elected or appointed. It does not follow that the duties and responsibilities of the one are less important than those of the other. The case of Cline v. Martin, 94 Ohio St., 420, 115 N. E., 37, has many points in common with the instant controversy. That case was [fols. 59-61] heard at a time when the members of the county school board were appointive. At that time the provisions for obtaining funds to carry on the work of the county board were much the same as the provisions of the general district health law, which has already been adverted to.

State, ex rel. Atty. Gen., v. Covington, 29 Ohio St., 102; State v. Baughman, 38 Ohio St., 455, and State, ex rel. Herron v. Smith, 44 Ohio St., 348, 7 N. E. 447, 12 N. E., 829, each and all present analogies to the instant case, as showing the exercise of the functions of levying taxes by persons and boards holding office by appointment and the approval of such exercise by this court. It is true that in all of those cases counsel did not argue the points which

have been so strongly presented in the instant case, but upon thorough inquiry into the subject we are of the opinion that the Constitution has fully authorized the Legislature to create districts, as separate political subdivisions, and to create boards to exercise the governmental activities of the district, and to utilize such boards as fact-finding agencies, and to determine the financial needs of such districts, and to impose and collect taxes to defray the same.

A minority of the members of this court finds no conflict in the District Park Board Act with any of the provisions of the Constitution. The act was held to be valid and constitutional by the Court of Appeals, and a minority of this court is therefore under the necessity of affirming that judgment, since the Constitution requires the concurrence of all but one of the judges of this court to hold it to be unconstitutional. The judgment in each case is affirmed.

Judgments affirmed.

Kinkade, J., concurs.

[fol. 62] IN SUPREME COURT OF OHIO

[Title omitted]

PETITION IN ERROR—Filed August 17, 1928

The plaintiff in error, Pauline Wadsworth, suing as a taxpayer and freeholder of Bay Village, Cuyahoga County, Ohio, for her petition in error says that on the 12th day of July, 1928, the Court of Appeals of Cuyahoga County in an action and proceeding on appeal from the Court of Common Pleas of Cuyahoga County, Ohio, therein pending, wherein this plaintiff in error was plaintiff and these defendants in error were defendants, rendered a judgment in favor of said defendants and against said plaintiff and dismissed the plaintiff's amended petition at her costs.

A transcript of the docket and journal entries of the Court of Common Pleas and of the Court of Appeals in said action and proceeding is filed herewith together with the original papers and pleadings. There is error in said record and proceedings in this, to-wit:

[fol. 63] 1. That judgment should have been rendered in favor of this plaintiff in error.

2. That the court erroneously decided the constitutional questions involved adversely to this plaintiff in error.

3. That the court erred in its conclusions of law as applied to its findings of fact.

4. That the court erred in rendering judgment upon the facts found by it in favor of the defendants in error.

5. That the plaintiff in error has been denied the protection of the constitutional provisions set forth in her amended petition.

6. That the court erred in holding that the Defendant Board of Park Commissioners constitutes a body politic and corporate.

7. That the court erred in holding that the Defendant Board of Park Commissioners has the constitutional authority to levy taxes.

8. For other errors manifest on the face of the record.

The plaintiff in error, therefore, prays that said judgment may be reversed and that she be restored to all things she lost by reason thereof.

George D. Hile and Snyder, Henry, Thomsen, Ford & Seagrave, by Frederick A. Henry, Attorneys for Plaintiff in Error.

[fol. 64] Waiver of Summons and Entry of Appearance

The defendants in error waive the issue and service of summons in error and enter their general appearance herein.

Locher, Green & Woods, Attorneys for Defendants in Error. Edward C. Stanton, Prosecuting Attorney, Cuyahoga County, by E. J. Thobaben, Asst. Pros. Atty., Attorneys for John A. Zangerle County Auditor.

In Court of Common Pleas of Cuyahoga County

Docket and Journal Entries

February 16, 1926.—Petition and precipe filed and summons issued.

February 23, 1926.—Answer of John Zangerle filed.

February 26, 1926.—Motion by The Board of Park Commissioners to advance filed.

February 26, 1926.—Answer of Defendants Board of Park Commissioners, etc., filed.

February 26, 1926.—Answer of The Union Trust Company filed.

[fol. 65] February 25, 1926.—Summons returned endorsed: On the 17th day of February, 1926 I served this writ on the within named John A. Zangerle, Wm. A. Stinchcomb by delivering a true and certified copy thereof with all the endorsements thereon. On the same date I served this writ on the within named The Board of Park Commissioners of the Metropolitan Park District of Cleveland by handing a true and certified copy thereof with all the endorsements thereon to E. P. Barklet, Managing Agent of said Co. The president or other chief officers of said Co. not found in my county. On the 18th day of February, 1926 I served this writ on the within named Warren S. Hayden, Louis E. Moses, by handing to each of them a true and certified copy thereof with all endorsements thereon. On the same date I served this writ on the within named The Union Trust Company a corp. by handing a true and certified copy thereof with all the endorsements thereon to C. S. Bichberger, managing agent of said Company. The President or other officers of said Co. not found in my county. The within named Harry M. Farnsworth not found in my county. Sheriff's Fees $2.37.

March 8, 1926.—Amended petition filed.

March 12, 1926.—Answer to Amended petition filed.

March 13, 1926.—Answer to Amended petition filed.

March 13, 1926.—Answer to Amended petition filed.

March 25, 1926.—Demurrer of The Board Park Commissioners filed.

April 7, 1926.—Brief by Plaintiff filed.

April 8, 1926.—To Court: The motion by the defendant to advance is granted, and this cause is advanced to Equity Trial List for March 15, 1926. Journal 242, Page 1196.

[fol. 66] May 4, 1926.—To Court: The demurrer by the defendant, The Board of Park Commissioners, etc. to interrogatories attached to the petition is overruled as to Nos. 10, 11, 12 and 16 and sustained as to others, to which each party excepts. Journal 243, page 537.

May 27, 1926.—Answer filed.

July 1, 1926.—Motion by The Board of Park Commissioners to advance filed.

July 13, 1926.—To Court: The motion by the defendants, The Board of Park Commissioners, etc., to advance is overruled. Journal 244, page 147.

September 10, 1926.—Motion to advance filed.

September 10, 1926.—To Court: The motion by the defendants, The Board of Park Commissioners, etc. to advance is granted and this cause is advanced to Equity Trial List for September 20, 1926. Journal 245, page 47.

February 5, 1927.—Motion by Plaintiff for New Trial filed.

February 5, 1927.—Motion by Plaintiff for rehearing filed.

February 21, 1927.—To Court: The motion for a new trial is overruled, to which the plaintiff excepts. Journal 246, page 936.

February 21, 1927.—To Court: The motion for a rehearing is overruled, to which the plaintiff excepts. Journal 246, page 936.

May 5, 1927.—To Court: This cause coming on for trial, and the defendants being all duly served with process, the same was heard upon the pleadings and the evidence, and in consideration thereof, and being fully advised in the premises, the Court finds for the defendants, and the plaintiff having first withdrawn her request that the Court make [fol. 67] a separate finding of its conclusions of fact and law, judgment is rendered in favor of the defendants, to which plaintiff excepts, and notice of appeal by her being given, bond for said purpose is filed at $500.00. The Court further finds that the plaintiff has just and reasonable grounds for instituting this cause, and which has been vigorously prosecuted on her behalf by her attorney,

George D. Hile, and at costs and expenses incurred in so doing, to the amount of $300.00, which sum is awarded as a judgment against the County, and to be paid out of the County Treasury upon the warrant of the auditor issued upon the County Treasurer in favor of George D. Hile, in the sum of $300.00. Journal 247, page 672.

June 21, 1927.—Appeal bond by Plaintiff to Court of Appeals in $500.00 with E. H. Bryant as surety filed.

(Duly certified.)

IN COURT OF COMMON PLEAS OF CUYAHOGA COUNTY

AMENDED PETITION—Filed March 8, 1926

Plaintiff says that she is a taxpayer in Bay Village, which is located in Cuyahoga County and that she resides in said Village; that she brings this action as a taxpayer on behalf of the taxpayers of said Village, and for the benefit of Cuyahoga County and the taxpayers thereof; after having made written demand on the — day of January, upon Edward C. Staton, Prosecuting Attorney for Cuyahoga County that he institute this action and his refusal in writing to do so.

Plaintiff says that John A. Zangerle is the duly elected and acting Auditor for Cuyahoga County, Ohio; that [fol. 68] Harry A. Farnsworth, Warren S. Hayden and Louis E. Moses constitute the Board of Park Commissioners of the Metropolitan Park District in Cleveland, Ohio; and that defendant Wm. A. Stinchcomb is Secretary of said Park Board and appointed by the Commissioners of said Board and that The Union Trust Company is an Ohio banking corporation.

Plaintiff complaining of defendants and for her cause of action says that said Park Board Commissioners, defendants, on or about the — day of December, 1925, entered into a written agreement with The Union Trust Company of Cleveland, Ohio, defendant herein, whereby said The Union Trust Company gave to the Board of Park Commissioners of the Metropolitan Park District of Cleveland the right to acquire the title to the following piece of property, to-wit:

Situated in the Village of Bay, Cuyahoga County, and State of Ohio, and known as being part of original Dover Township, Lot No. 94, and bounded and described as follows: Beginning on the Southeasterly corner of said Original Lot No. 94; thence Westerly along the Southerly line of said original lot No. 94, (which is also the center line of Wolf Road, 60 feet wide) to the south-easterly corner of land conveyed to Seth Johnson by deed dated July 6th, 1842 and recorded in Vol. 31, page 427 of Cuyahoga County Records; thence Northerly along the Easterly line of land so conveyed to Seth Johnson to the southerly shore of Lake Erie; thence Easterly along the southerly shore of Lake Erie to the Easterly line of said original lot No. 94; thence southerly along said Easterly line of original Lot No. 94 to the place of beginning, excepting therefrom that part of Westlake Road, within bounds of the above described [fol. 69] premises and excepting therefrom land conveyed to The Lorain and Cleveland Railway Company by deed dated November 18th, 1897, and recorded in Volume 675, page 321 of Cuyahoga County Records, be the same more or less but subject to all legal highways.

which it recently acquired title to by deed from George F. Koelliker subject to mortgages thereon aggregating Two Hundred and Fifty Thousand ($250,000.00) Dollars; that on or about December 5th, 1925, which was the date that said Koelliker conveyed the title to the above described premises to The Union Trust Company, the Board of Park Commissioners of the Metropolitan Park District in Cleveland entered into a written contract or option with the defendant, The Union Trust Company.

Plaintiff believes and alleges the fact to be that said Park Board Commissioners by the terms and provisions of the contract heretofore mentioned are given the option of acquiring the legal title to the above described land on or before the first day of October, 1928, subject to Two Hundred and Fifty Thousand ($250,000.00) Dollars in mortgages thereon mentioed above, providing said Park Board Commissioners pay or cause to be paid to The Union Trust Company an additional sum of Two Hundred and Fifty Thousand ($250,000.00) Dollars, and in additon and as a further consideration for securing the

said optional contract are required to pay the taxes and assessments on said land and to pay the insurance premiums on all the fire or other insurance policies placed upon the buildings on said land above described during the term said optional contract is in force and also during the time said contract is in force that said Park Board [fol. 70] Commissioners are given the right to take possession of said lands and place a keeper or persons in charge of same without any expense or costs to The Union Trust Company.

Plaintiff says that said Park Board of Commissioners had or have no legal right to enter into said optional contracts and incur the obligations above mentioned requiring the expenditure of public funds for the following reasons:

First. That the Auditor of Cuyahoga County never certified that the funds to meet said obligations were in the Treasury or available, or in the process of collection for said purpose before said optional contract was entered into.

Second. That said Park Board Commissioners have no legal authority under Section 2976-7 G. C. or the general law to authorize the expenditure of public funds for options on land or pay keepers or persons put in charge thereof by them during the running of an option taken thereon as it is speculative and against public policy.

Plaintiff says premises above described are located above five (5) miles from any land now constituting a part of said Metropolitan Park System; that no lake nor lakes, submerged or swamp lands are upon said premises above described nor are there any perpetual running streams thereon and only very little small timber, which is on the southerly portion thereof and that there are no natural resources of any kind on or under the premises above described and that said land possesses none of the character- [fol. 71] istics of land mentioned in Section 36 Article 2 of the Constitution of Ohio, but that all of said land above described is admirably suited and fitted for allotment purposes for high class homes as said Park Board of Commissioners well know but who have as plaintiff believes and alleges the fact to be purposely secured the aforesaid men-

tioned option thereon with the view of ascertaining whether they can secure control of Cahoun Memorial Park, consisting of about One Hundred and Fifteen (115) acres of land located in Bay Village to which Village J. J. Cahoun gave said land for a memorial park subject to and upon conditions which said Bay Villiage nor its officials have no legal right to delegate to said Park Board Commissioners of the Metropolitan Park District in Cleveland to carry out or comply with, without forfeiting the said Village's right and title to said land constituting said Cahoun Memorial Park to the heirs of said J. J. Cahoun; that said park lies a little east of the above described premises which the said Park Board Commissioners will have no use for nor desire to secure for park purposes unless they can secure control of said Cahoun Park land.

Plaintiff says the lands above described constitute about one-sixteenth (1/16) of the land of tax valuation on the tax duplicate of Bay Village, Ohio, which if conveyed to or becomes a part of said Metropolitan Park System will be taken off the tax duplicate of said Village and that of the County and thereby impose a higher rate of taxes upon the balance of the land in said Village.

Plaintiff says that said Park Board Commissioners herein have no lawful right to do the acts and things herein complained of conferred upon them by virtue of an Act [fol. 72] passed by the General Assembly March 6th, 1917, 107 Ohio Laws page 65, and one passed by said body April 9th, 1919, 108 Ohio Laws Part Second, page 1097, as both of said acts are unconstitutional and void, being special acts, conferring corporate powers in violation of section 1 of Article XIII, of the Constitution of Ohio, and for the further reason, that under said Acts the authority to make application for the creation of the Park District within a county is conferred upon a majority of the electors residing within the proposed district or in lieu thereof by resolution adopted by one of the legislative or quasi legislative bodies named in Section 2976-2 of the General Code, that under said acts neither the electors nor taxpayers are permitted to vote upon the question as to what territory shall be embraced within the application for creating a Park District, nor after it has been created

are the taxpawers or electors in said Park District permitted to vote upon the question as to whether said Park District, as ordered created by the Probate Judge, shall or shall not be approved by a majority vote of the electors therein residing, none of whom have been summoned in, or before the court, so that any order or decree can be entered by said court, that is valid under the due process of law, provided in Section 1, Article XIV of the Constitution of the United States, and the fundamental law of Ohio; that the determining of what the geographical boundaries of a territory shall be, is a political or legislative question, which cannot be delegated to the judiciary, by the General Assembly. And Sections 2976-3 and 2976-4 of General Code are unconstitutional for said reason; that Section 2976-5 General Code delegates to the judiciary the right to appoint Park Board Commissioners, who are not even, [fol. 73] by said Acts, required to be electors, voters, or even residents of the Park District, County or state, nor for whom the electors of the Park District are not permitted to vote; but who by the provisions of said two acts mentioned above are declared to be a body politic and corporate, capable of suing and being sued as a board, and as such employ a Secretary and such other employees as may be necessary in the performance of the powers therein conferred; to acquire lands within or without such district by purchase or condemnation proceedings or by agreement with other public authorities, empowered to improve and delevop land acquired and levy assessments for the cost therefor, as in Section 2976-9 General Code provided, and to which Board of Park Commissioners by Section 2976-10 General Code is empowered to levy taxes upon all the taxable property within such district, in an amount not in excess of one-tenth (1/10) of a mill upon each dollar of its assessed value, of the property in the district, in any one year, subject, however, to the combined maximum levy for all purposes otherwise provided by law; which levy the budget commission in the County in which said District is located, shall, unless modified by it, due the combined maximum levy for all purposes provided by law, certify to the County Auditor, who is required to place said levy upon the tax duplicate, that the County treasurer of the

County wherein said district is located, shall be the custodians of the tax funds and who, together with the Auditor of the County are made, by Section 2976-10b, General Code, ex officio officers of said Park Board, but who in fact, by the provisions of said two acts, are made the ministerial agents of said Park Board Commissioners; none of whom are [fol. 74] elected and in no way answerable to the electors or taxpayers nor if removed given the right to choose a successor or successors that under the provisions of section 2976-10d, General Code, territory whether within or without a County, if adjacent and contiguous may be annexed to any existing park district, as therein provided, which is illegal; First, for the reason that it initiated by a petition signed by a majority of the electors residing in the district proposed to be annexed, or by not less than fifty electors therein; Second, that to the said Park Board Commissioners is delegated the sole right of determining whether said petition shall be acted upon favorably, and steps taken in probate court to annex, or of their own motion file such petition with the probate court, in a County to whom they are in no way answerable, nor over whom he has any control, nor the taxpayers or electors residing within the territory that may be annexed, and which deprives them of their constitutional right of self-determination. Not only as to whether the territory shall be annexed, but the natural and inherent right of saying, whether they wished to be taxed; that under the provisions of Section 2976-10e, General Code, when territory is annexed to a Park District, created in another County, that the budget commission of such County and the Auditor and Treasurer thereof are subjected to the mandatory requirements, imposed on them by Sections 2976-10 and 2976-10b General Code, which shaid Park Board Commissioners can inforce in each and all counties, as said two acts authorized and enabled said Park Board Commissioners to levy taxes of different rates in the territory in each County where territory is annexed, in violation of the uniform rate provision in Section 2 of Article 12 of the [fol. 75] Constitution of Ohio; for under the provisions of the Acts herein complained of each County budget commission, and the officers named therein, are independent bodies or officials, severally dominated by the Park Board Com-

missioners, to whom, by said two acts herein mentioned, is delegated the greatest authority of sovereign power,—that of levying taxes,—and which the defendants. Park Board Commissioners have been and will continue to levy, not for the purpose of acquiring lands of the character and for the purposes enumerated in Section 36 of Article II of the Constitution of Ohio, to any extent, but mostly farm lands, suitable for allotting and high class residential purposes; that the Exhibit "A", hereto attached and made a part of this petition, as though incorporated, shows thereon, in heavy black, what said Park Board Commissioners have, or claim to have acquired the title to; and that in dotted black, land they have in some manner tied up or propose to acquire, as empowered by said two acts. The major portion of which is to be used for constructing boulevards over to connect up to the various tracts marked in heavy black on said Exhibit "A", but not for the purposes enumerated in section 36 of Article II of the Constitution; that said Park Board Commissioners have acquired title to about sixty-five hundred (6500) acres of land, about three hundred (300) acres being in Hinckley Township, Medina County, Ohio, which was annexed in 1923; about Four Hundred (400) acres being in Lake County, Ohio; and the balance being in Cuyahoga County; and that, in each of the said three counties, said Park Board Commission now has pending condemnation actions to acquire land, not for the purposes, and of the character, enumerated in said — 36 of Article II, heretofore referred to; [fol. 76] that Section- 2976-10g and 2976-11h are unconstitutional, due to delegation to said defendants, Park Board Commissioners, the power to enact penal measures, and exercise police powers and clothe all their employees with powers of police officers.

That said Park Board Commissioners herein and contrary to the objects to be attained by Section 36 of Article II of the Constitution of Ohio have acquired lands, which the county commissioners of Cuyahoga County need for the purpose of sewers, for the public's good and welfare, and which said Park Board Commissioners refuse to permit said County officials from entering upon or using for public purposes; that said Commissioners can, by virtue of said two acts mentioned above, ex officio by acquiring all of the

land in any township or townships, destroy a township government, or even that of a County; that all lands acquired by them is exempted from taxation and the burden of public debt falls upon the other land.

That said Park Board Commissioners have been expending large sums of money, without warrant, and not in furtherance of accomplishing the objects mentioned in Section 36 of Article II of the Ohio Constitution; that the pay roll of said Board, not including a salary for its Secretary of Ten Thousand ($10,000.00) Dollars per year, was for 1922, Fifty Thousand Seven Hundred Twenty-six and 40/100 ($50,726.40) Dollars; for 1923, Forty-seven Thousand Seven Hundred Twenty-five and 17/100 ($47,725.17) Dollars; for 1924, Forty-four Thousand Seven Hundred ($44,700.00) Dollars; for 1925, Ninety-nine Thousand Seven Hundred Thirteen and 16/100 ($99,713.16) Dollars, in which sums Attorney fees are included, which said two acts do not authorize said Park Board to employ, and the statutes for-
[fol. 77] bid; that said employees consist of engineers, draftsmen, carekeepers, and useless supernumeraries; that said Park Board have and will continue to expend public funds, not for the public's good or welfare, but to its loss and detriment, and should be restrained and perpetually enjoined from doing so.

Plaintiff says that said Park Board Commissioners are either public officers, holding said office in violation of Section 20 of Article 2 of the Constitution of Ohio, due to not having been elected and in violation of section 27 of said Article and section 1 of Article X of said Constitution, requiring all officers to be elected, yet have taken the oath of office required by Section 7 of Article XV of the Constitution of Ohio; or the members of said Park Board hold their said positions under said two acts analogous to directors in a private corporation, due to the passage of special acts conferring corporate powers, plenary to the extremes, which the said Park Board Commissioners can and do arbitrailry use, and should be restrained and perpetually enjoined from doing, any of the acts and things authorized to be done under the provisions of said two acts above stated, all of which provisions violate the provisions of the Constitutions herein set forth, and that said two acts contain more than one subject, inhibited by Sec. 16, of Article II, Ohio Constitution.

That the Metropolitan Park District, when first established by virtue of Acts above mentioned, comprised all of Cuyahoga County, Ohio, excepting the territory constituting Bay Village, which was later annexed; and that by reason thereof the benefits of the Act passed by the General Assembly on April 17th, 1925, 111 Ohio Laws, page [fol. 78] 504, cannot be availed of or enjoyed by the people of the township in Cuyahoga County or in Hinckley Township in Medina County; and, said law cannot have uniform operation throughout the state in violation of section 26 of Article II of the Constitution of Ohio, and are denied the equal protection of the law guaranteed by Section 1, of the 14th Amendment to the Federal Constitution; that under provision of Section 1 of Article II of the Constitution of Ohio, the General Assembly cannot delegate to its said Park Board Commissioners the powers conferred by said two acts above mentioned, for they are not a governmental body, but exercise powers not unlike County Commissioners, yet are not elected as required by Section 2 of Article X of the Constitution of Ohio and who are by said Acts complained of, in truth and fact County Officers, who can and do exercise over the County Officers, named in said legislation, in any County, a part or all of which has been annexed, independent of other counties, a part or all of which has been annexed to said Park District, not only to the detriment of the people therein as well as the State at large, and that to enact the aforesaid mentioned acts was not within the power of the General Assembly under the Constitution of Ohio and are void.

Plaintiff says she has no adequate remedy at law by which she can prevent the Park Board Commissioners, defendants herein, from doing the acts and things herein complained of and that a court of equity only can grant relief to which she is entitled, by restraining and perpetually en- [fol. 79] joining the said defendants.

Wherefore plaintiff prays that a restraining order be granted restraining said John A. Zangerle, Auditor of Cuyahoga County from honoring any orders, bills or claims, of any kind or nature presented or issued to him by the Park Board of Commissioners, to-wit: Harry M. Farnsworth, Warren S. Hayden and Louis E. Moses, or Wm. A. Stinchcomb, Secretary of said Board requiring the said Auditor to issue his warrants therefor upon the Treasurer

of Cuyahoga County and that said John A. Zangerle be restrained and perpetually enjoined from issuing any future warrants for any bills, claims or demands of any kind or character upon the Treasurer of Cuyahoga County, for the payment of any obligations of any kind or character incurred for the purposes alleged in the above petition and for any other purpose and that said Park Board Commission and the members thereof above named, and the Secretary of said Board be restrained and perpetually enjoined from incurring obligations requiring the further expenditure of public money and that the court find that the optional contract entered into by said Park Board Commission with The Union Trust Company be declared illegal and void and held for naught and that such other and further relief be granted as in law or equity the Court will find necessary and proper in the premises, and declare said Metropolitan Park District Act unconstitutional.

Geo. D. Hile, Attorney for Plaintiff.

(Duly verified.)

[fol. 80] INTERROGATORIES

Defendant, Park Board Commissioners, are asked to answer the following questions:

1. What portion of the land acquired by you, was, when title was secured: (1) Covered with virgin forest? (2) Cleared land? (3) Devoted to or suitable for farming?

2. How many acres, if any, of the above classes of lands have you proceeded to reforest with trees native of northern Ohio?

3. How many acres of land have you acquired in Lake County, Ohio and in Medina County, Ohio?

4. How many condemnation suits have you now pending in the counties last above named, and how many in Cuyahoga County, Ohio? How many parcels of land are there enumerated in said suits?

5. How many acres of land have you purchased in Lake County, Ohio, from whom and how much per acre did the Grantees receive?

6. What were or are the natural resources upon the lands you have purchased for the Metropolitan Park District of Cleveland, that you have conserved by acquiring said lands?

7. How many, if any, natural lakes are there upon the lands you have purchased?

8. How many acres of submerged land, and how many of swamp land and how many acres of submerged land is there upon the lands that you have acquired title to?

[fol. 81] 9. Do you receive any rentals or income from any of the lands embraced within the Metropolitan Park District of Cleveland?

10. What are the natural resources upon the John Huntington property described in the petition, that will be conserved by the Park Board Commissioners acquiring said described lands?

11. Are there any perpetual running streams on the land described in this petition? Is the John Huntington land suitable for high grade residence purposes?

12. Are there any natural lakes, swamp or submerged land on said John Huntington land and how much of each, if any?

13. How many of your appropriation suits have been conducted by the prosecutor of Cuyahoga County?

14. How many of your appropriation suits have been conducted by the firm, Messrs. Locher, Green and Woods?

15. How much money have you paid each year to Messrs. Locher, Green and Woods?

16. Have you a contract or option for the purchasing of the John Huntington land described in the petition? If so what are the terms and conditions thereof?

In Court of Common Pleas of Cuyahoga County

Answer of John A. Zangerle—Filed March 13, 1926

Comes now John A. Zangerle, one of the above named defendants, and for his answer to the petition of the plain-

tiff herein, admits the official capacity of the defendants as [fol. 82] alleged; that a request was made by the plaintiff to the Prosecutor of the County aforesaid to bring an action upon the cause set forth in the petition herein and that the Prosecutor declined so to do.

Saving the foregoing admissions, this defendant denies each and every averment in said petition contained.

Edward C. Stanton, Prosecuting Attorney of Cuyahoga County, Ohio, by E. J. Thobaben, Assistant Prosecuting Attorney.

(Duly verified.)

IN COURT OF COMMON PLEAS OF CUYAHOGA COUNTY

ANSWER BY THE BOARD OF PARK COMMISSIONERS OF THE CLEVELAND METROPOLITAN PARK DISTRICT, HARRY M. FARNSWORTH, WARREN S. HAYDEN, LOUIS A. MOSES, AND WM. A. STINCHCOMB—Filed March 13, 1926

Now come the Board of Park Commissioners of the Cleveland Metropolitan Park District, Harry M. Farnsworth, Warren S. Hayden, Louis A. Moses, and Wm. A. Stinchcomb, defendants herein, and for answer to the amended petition of the plaintiff herein, admit that said plaintiff is a taxpayer in Bay Village, Cuyahoga County, Ohio, and that she resides in said Village; that demand was made by plaintiff upon Edward C. Stanton, Prosecuting Attorney for Cuyahoga County, as alleged; that [fol. 83] John A. Zangerle is the duly elected and acting Auditor for Cuyahoga County, Ohio; that Harry M. Farnsworth, Warren S. Hayden and Louis A. Moses, constitute the Board of Park Commissioners of the Cleveland Metropolitan Park District; that Wm. A. Stinchcomb is Secretary of said Board and appointed by said Commissioners; that The Union Trust Company is a corporation as alleged; and that said Board of Park Commissioners have acquired large areas of land, aggregating more than 5500 acres, for the purpose for which said Board is by law authorized to acquire lands.

Further answering, these defendants deny each and every other allegation in said amended petition contained and not herein expressly admitted.

Locher, Green & Woods, Attorneys for Defendant. Board of Park Commissioners of the Cleveland Metropolitan Park District, Harry M. Farnsworth, Warren S. Hayden, Louis A. Moses and Wm. A. Stinchcomb.

(Duly verified.)

In Court of Common Pleas of Cuyahoga County

Answer by the Union Trust Company—Filed March 13, 1926

Now comes The Union Trust Company, defendant herein, and for answer to the amended petition of the plaintiff herein, admit that said plaintiff is a taxpayer in Bay Vil- [fol. 84] lage, Cuyahoga County, Ohio, and that she resides in said Village; that demand was made by plaintiff upon Edward C. Stanton, Prosecuting Attorney for Cuyahoga County, as alleged; that John A. Zangerle is the duly elected and acting Auditor for Cuyahoga County, Ohio; that Harry M. Farnsworth, Warren S. Hayden and Louis A. Moses, constitute the Board of Park Commissioners of the Cleveland Metropolitan Park District; that Wm. A. Stinchcomb is Secretary of said Board and appointed by said Commissioners; that The Union Trust Company is a corporation as alleged; and that said Board of Park Commissioners have acquired large areas of land, aggregating more than 5500 acres, for the purpose for which said Board is by law authorized to acquire lands.

Further answering, these defendants deny each and every other allegation in said amended petition contained and not herein expressly admitted.

Locher, Green & Woods, Attorneys for Defendant, The Union Trust Company.

(Duly verified.)

IN COURT OF COMMON PLEAS OF CUYAHOGA COUNTY

DEMURRER BY THE BOARD OF PARK COMMISSIONERS OF THE CLEVELAND METROPOLITAN PARK DISTRICT TO THE INTERROGATORIES—Filed March 25, 1926

Now comes the Board of Park Commissioners of the Cleveland Metropolitan Park District, defendant herein, [fol. 85] and demurs to the interrogatories attached to the petition of the plaintiff herein on the grounds that said interrogatories are not relevant or material to the issues in this cause.

Locher, Green & Woods, Attorneys for Defendant, the Board of Park Commissioners of the Cleveland Metropolitan Park District.

IN COURT OF COMMON PLEAS OF CUYAHOGA COUNTY

ANSWER OF THE DEFENDANT, BOARD OF PARK COMMISSIONERS OF THE CLEVELAND METROPOLITAN PARK DISTRICT, TO INTERROGATORIES—Filed May 27, 1926

Now comes the Board of Park Commissioners of the Cleveland Metropolitan Park District, defendant herein, and reply to certain of the interrogatories attached to the amended petition herein, makes reply to the tenth, eleventh, twelfth, and sixteenth of said interrogatories as follows:

Tenth Q. What are the natural resources upon the John Huntington property described in the petition, that will be conserved by the Park Board Commissioners acquiring said described lands?

A. Its adaptability for general public recreational uses, by reason of its location, topography, and lake frontage.

Eleventh Q. Are there any perpetual running streams on the land described in this petition? Is the John Huntington land suitable for high grade residence purposes? [fol. 86] A. (a) There is a running stream upon the property, which is of practically continuous flow. (b) In part.

Twelfth Q. Are there any natural lakes, swamp, or sub-

merged land on said John Huntington land, and how much of each, if any?

A. The property borders on Lake Erie for a distance of approximately 2,000 feet. The land within the bed of the stream mentioned in Question 11 is submerged, and a portion of the land adjacent to said stream is swampy. The areas of such natural lakes, submerged and swampy lands cannot now be given, as surveys are necessary to that information, and no such surveys have been made.

Sixteenth Q. Have you contract or option for the purchase of the John Huntington land described in the petition? If so, what are the terms and conditions thereof?

A. The Board of Park Commissioners of the Cleveland Metropolitan Park District has no contract or option for the purchase of the John Huntington property unless a written agreement entered into by and between William R. Huntington, Margaret Huntington Smith, and John H. Hord, as First Parties, The Union Trust Company, as Second Party, and George B. Koelliker, as Third Party, should be deemed to constitute such contract or option. This agreement recites that with the knowledge and consent and approval of the First Parties, the Third Party has conveyed the premises to the Second Party, and provides that the Second Party shall hold the legal title to such premises and make conveyance thereof upon the terms and conditions specified in the agreement; provides that immediately upon the execution of such agreement, the Second Party shall execute its limited warranty deed of said premises to [fol. 87] the Board of Park Commissioners of the Cleveland Metropolitan Park District, which deed shall be held in the escrow department of the second party and be delivered to said Board of Park Commissioners upon said Board complying with and fulfilling certain terms, to-wit:

1. That said Board shall on or before October 1927, pay to The Union Trust Company the sum of $300,000.00 in cash, and assume and agree to pay $200,000.00 note and mortgage described in the agreement.

2. That said Board shall, as same become due and payable, pay the taxes and assessments now or hereafter levied upon said premises, beginning with the taxes and assessments for the first half of the tax year 1925.

3. That said Board shall keep said premises in good and tenantable condition of repair, and shall maintain fire insurance upon the buildings and improvements located thereon to the amount of their reasonable insurable value, which policies of insurance are to — made payable to the Second Party and are to be deposited with it.

4. That said Board shall have the use and occupancy of said premises from and after the date of the agreement, but during such occupancy and until the aforesaid deed shall have been delivered to it, it shall not in any substantial manner change or modify the surface of said premises, nor change, modify or remove any of the buildings, plantings and other improvements now located on said premises.

5. That if said Board shall fail, neglect, or refuse to keep and perform any of the terms and conditions in paragraphs 1, 2, 3, and 4, hereinbefore recited, then it shall immediately forfeit all its rights, claims, and privileges therein, and said deed, so delivered in escrow, shall forthwith be returned [fol. 88] to The Union Trust Company and be by it destroyed and said The Union Trust Company shall thereafter hold title to said premises and convey same as further provided in said agreement.

Locher, Green & Woods, Attorneys of Defendant, the Board of Park Commissionres of the Cleveland Metropolitan Park District.

(Duly verified.)

In Court of Common Pleas of Cuyahoga County

Motion for a New Trial—Filed Feb. 5, 1927

The plaintiff moves the court for a new trial for the following reasons, to-wit:

1. The court erred in admitting evidence offered on behalf of the defendants, to which the plaintiff objected.

2. The court erred in rejecting evidence offered by the plaintiff, and to which plaintiff excepted.

3. The court found for the defendants when it should have found for the plaintiff.

4. The judgment was given for the defendants when it should have been given for the plaintiff.

5. The said findings and judgment are contrary to law.

6. The court erred in its findings and conclusion of law.

7. That the court erred in holding; 1. that the defendant Park Board Commissioners have the right or power to em- [fol. 89] ploy attorneys and pay them out of public funds; 2. to hire automobiles and pay for the use of them out of public funds; 3. to pay for abstracts furnished by persons from whom said Board purchases land; 4. and to expend money to secure the possession and enjoyment of the John Huntington Farm by paying and agreeing to pay all taxes and special assessments levied against said farm during the time that said Park Board has in possession and enjoys the use of the same.

Geo. D. Hile, Attorney for Plaintiff.

In Court of Common Pleas of Cuyahoga County

Motion for a Rehearing—Filed Feb. 5, 1927

Plaintiff asks this Honorable Court that she be granted a re-hearing or an opportunity to re-argue the same more fully. That the constitutional questions involved are of such paramount importance to justify the court in granting this request. Furthermore, that the power of The Metropolitan Park District Board to employ attorneys, pay for abstracts, furnished by persons from whom it buys property, to hire automobiles and pay for the use thereof, and to secure the possession of property, to-wit, the John Huntington Farm and enjoy the possession thereof by paying all taxes and special assessments levied against it in consideration of having the use and possession of said farm, are powers and rights not conferred upon Park Board Commissioners expressly or by implication by the statutes [fol. 90] of Ohio, which questions the court should grant the privilege of allowing the plaintiff's request in this motion.

Geo. D. Hile, Attorney for Plaintiff.

In the Court of Appeals of Cuyahoga County

Docket and Journal Entries, with Findings of Fact and Conclusions of Law

June 2, 1927.—Transcript, Original Papers from Common Pleas filed. Appeal bond in $500.00 with E. H. Bryant, as surety, filed.

April 30, 1928.—Brief of Plaintiff in error, and two copies filed.

May 3, 1928.—Request by Plaintiff for finding of fact and Law filed.

July 12, 1928.—To Court. This cause came on this day to be heard on the amended petition and subsequent pleadings and the evidence and the plaintiff herein having made and filed a request in writing before judgment for a finding of facts herein separate and apart from the conclusions of laws, the court now therefore makes the following

Findings of Fact

1. The relator, Pauline Wadsworth, is, and at the time of starting this action was, an adult taxpayer of Cuyahoga [fol. 91] County, and before bringing this suit she made written demand upon the prosecuting attorney of said county to commence action against the defendants upon the same grounds and for the same relief as in the petition set forth, which demand was refused.

2. The defendants are, and at the time this cause was begun they were, holding and occupying, and except as herein otherwise indicated, qualified to hold and occupy, the offices and positions herein ascribed to them respectively.

3. Neither the Board of Park Commissioners of the Metropolitan Park District in Cleveland, nor any of its members, is an elective or an elected officer or officers.

4. Said Board and the members composing it claim and exercise the right to levy taxes, both with and without a vote or votes of the electors in said District, and they have hitherto levied and collected taxes on the property therein, including the propery of relator, and will continue so to do unless enjoined.

5. That said District was originally organized and now exists in conformity with the statutes of Ohio, which purport to authorize it, and as first established it embraced less than all the territory and land within the county of Cuyahoga; but by subsequent proceedings in accordance with the said act it afterwards became co-extensive with said county, and thereafter by further proceedings, consonant with said statute and its amendments, the whole of Hinckley township in Medina County, Ohio, became and is annexed to said District, and said Board has furthermore acquired title to land in Lake County, which is not annexed.

[fol. 92] 6. Said Board has, by resolutions from time to time passed by its members, authorized the doing, and itself and its agents have done and performed, the following matters and things, and unless enjoined will continue hereafter to do the like, namely:

(a) Employing attorneys to represent it in litigation and other matters and paying moneys to such attorneys out of funds under its control derived from taxation, whereof, between September 1, 1923, and January 1, 1927, it has paid for legal services, as disclosed by its payroll, the sum of $13,556.38.

(b) Expending money for automobile hire and trucking out of funds under its control, derived from taxation, whereof, for the years 1923 to 1926, both inclusive, it has expended for said purposes, the sum of $10,001.81, which expenditures were incurred in furtherance of activities authorized by the statutes under which said Board operates.

(c) Entering into a written contract for the clearing of about thirty acres of land in Hinckley township aforesaid, building a dam and creating an artificial lake to cover said thirty acres and additional land, and expending therefor from funds under its control, derived from taxation, the sum of $5,913.00, and further expending from such fund for the dam and lake aforesaid, the further sum of $80,605.45, and by supplemental contract or additional work thereon the further sum of $31,004.88, and by another written contract supplemental to the last mentioned one, it expended from like funds the further sum of $6,055.26; for

all of which expenditures in Medina County the Auditor of Cuyahoga County previously issued his certificate that the funds for meeting the obligations so paid were on hand and available to pay the same.

[fol. 93] 7. That the Union Trust Company of Cleveland, Ohio, wrote to said Board the letter, and thereupon the resolution embodying said letter was passed by said Board, as follows:

"Resolution No. 949, By Mr. Farnsworth (Huntington Property)

Whereas the Union Trust Company, of Cleveland, Ohio, holding legal title to the following described premises, put in trust for William R. Huntington, Margaret Huntington Smith and John H. Hord, has filed with this Board, for and on behalf of itself and its trust, its offer under date of December 7, 1925, to sell and convey to this Board certain premises hereinafter described as follows:

Situated in the Village of Bay, County of Cuyahoga and State of Ohio, and known as being part of original Dover Township Lot No. 94, and bounded and described as follows:

Beginning on the south easterly corner of said original lot No. 94;

Thence westerly along the southerly line of said original lot No. 94; (which is also the center line of Wolf Road 60 feet wide), to the south easterly corner of land conveyed to Seth Johnson by deed dated July 6, 1842, and recorded in Volume 31, page 477 of Cuyahoga County Records;

Thence northerly along the easterly line of land so conveyed to Seth Johnson to the southerly shore of Lake Erie;

Thence easterly along the southerly shore of Lake Erie to the easterly line of said original lot No. 94;

Thence southerly along said easterly line of original lot No. 94; to the place of beginning, excepting therefrom that part of Westlake Road, within the bounds of the above described premises, and excepting therefrom land conveyed [fol. 94] to The Lorain and Cleveland Railway Company by deed dated Nov. 18, 1897, and recorded in Volume 675, page 321 of Cuyahoga County Records, be the same more or less, but subject to all legal highways and waterways;

upon terms and conditions set forth in said offer, as follows:

'Cleveland, Ohio, Dec. 7, 1925.

The Board of Park Commissioners of the Cleveland Metropolitan Park District, Old Court House, Cleveland, Ohio.

GENTLEMEN: The Union Trust Company, of Cleveland, Ohio, holding legal title to the following described premises, hereby offers to sell to the Board of Park Commissioners of the Cleveland Metropolitan Park District, the following described premises:

Situated in the Village of Bay, County of Cuyahoga and State of Ohio, and known as being part of original Dover Township, lot No. 94, and bounded and described as follows:

Beginning on the south easterly corner of said original Lot No. 94; thence westerly along the southerly line of said original Lot No. 94, (which is also the center line of Wolf Road, 60 feet wide), to the south easterly corner of land conveyed to Seth Johnson by deed dated July 6, 1842, and recorded in Volume 31, page 477 of Cuyahoga County Records; thence northerly along the easterly line of land so conveyed to Seth Johnson to the southerly shore of Lake Erie; thence easterly along the southerly shore of Lake Erie to the easterly line of said original Lot No. 94; thence south-
[fol. 95] erly along said easterly line of original lot No. 94, to the place of beginning, excepting therefrom that part of Westlake Road, within the bounds of the above described premises, and excepting therefrom land conveyed to The Lorain and Cleveland Railway Company by deed dated Nov. 18, 1897, and recorded in Volume 675, page 321 of Cuyahoga County Records, be the same more or less, but subject to all legal highways and waterways.

for the following consideration and under the following conditions, to wit:

First. The Union Trust Company shall forthwith execute and deliver to the escrow department of said bank, a deed with covenants of Limited Warranty warranting only as against all lawful claims and demands whatsoever, of all persons claiming by, through, from or under any act of said The Union Trust Company, excepting, however, all taxes and assessments now levied or hereafter levied upon said

premises, and excepting and subject to a mortgage of $200,000.00 on said premises, conveying said premises to the Board of Park Commissioners, of the Cleveland Metropolitan Park District.

Second. The Board of Park Commissioners of the Cleveland Metropolitan Park District shall on or before October 1st, 1927, pay to said The Union Trust Company, the sum of Three Hundred Thousand Dollars ($300,000.00), in cash, and accept and take title to said premises, subject to the aforesaid mortgage of $200,000.00; and thereupon, said limited Warranty deed shall be delivered to said Board of Park Commissioners.

Third. Said Board shall, as same become due and payable, pay the taxes and assessments now or hereafter levied upon said premises, beginning with the taxes and assess-[fol. 96] ments for the first half of the year 1925, being the half year taxes and assessments payable in December 1925.

Fourth. That said Board shall have the use and occupancy of said premises until October 1st, 1927, but shall keep said premises in good and tenantable condition of repair, and shall maintain fire insurance upon the buildings and improvements located thereupon to the amount of their reasonable insurable value; said policies of insurance are to be made payable to said The Union Trust Company, and are to be deposited with it. Any sums of money received by The Union Trust Company on account of loss under said policies, shall be used by said The Union Trust Company to repair or restore the property damaged or destroyed but if not so used, same shall be applied toward the reduction of the $300,000.00 cash payment, provided the Park Board shall purchase said premises.

Fifth. That while said Board shall have the use and occupancy of said premises, from and after the date of the acceptance of this proposal, but during such occupancy and until the aforesaid deed shall have been delivered to it, it shall not in any substantial manner change or modify the surface of said premises, nor change, modify or remove any of the buildings, plantings and other improvements now located on said premises.

Sixth. That if said Board shall fail, neglect, or refuse to keep and perform any of the terms and conditions in the preceding five paragraphs, then it shall immediately forfeit all its rights, claims and privileges thereunder, and said deed so delivered in escrow as aforesaid, shall forthwith be returned to The Union Trust Company, and pos- [fol. 97] session of said premises shall immediately be returned to The Union Trust Company, its successors or assigns.

Respectfully submitted.

The Union Trust Company of Cleveland, Ohio, by H. D. Messick, Vice-President, by Wm. A. Hiles, Asst. Secretary.'

Now, therefore, be it resolved by the Board of Park Commissioners of the Cleveland Metropolitan Park District, that the terms and conditions set forth in said offer are acceptable to this Board, subject to the approval of the title of this property by the Legal Counsel of this Board, and that this Board hereby indicates its intentions to purchase said property, upon said terms and conditions. and within the period of time specified in said offer.

Yeas—Messrs. Hayden and Farnsworth.

Nays—None."

8. That the Board of Park Commissioners after the passage of said resolution above, took possession of the premises mentioned in the letter of The Union Trust Company above, and performed the conditions required by its provisions to be performed, and paid the taxes and assessments amounting in all to $13,769.18 for the years 1925 and 1926.

9. That the Auditor of Cuyahoga County never issued any certificate that the funds were on hand or available, or in process of collection to meet the obligations set forth [fols. 98 & 99] in the above letter of The Union Trust Company, which the said Board of Park Commissioners by resolution above accepted.

And for conclusions of law the court finds, upon the issues joined, for the defendants; that the said Sections 2976-1 to 2976-i of the General Code of Ohio are in all respects valid and not in violation of the Constitution of

Ohio or the Constitution of the United States or any provision thereof, and that the proceedings had by the defendants are in all respects legal and valid, and judgment dismissing plaintiff in error's amended petition is entered against her, together with judgment for the costs of this suit, to all of which she excepts.

Journal 7, Page 481.

(Duly certified.)

[fol. 100] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED ON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed July 26, 1929

The appellant, State of Ohio, ex rel. Pauline Wadsworth, Taxpayer, Bay Village, Ohio, files the following statement of points to be relied upon:

Point One

The Park District Act (General Code of Ohio, Sections 2976-4 et *sqq.*) was held by the Common Pleas Court and the Court of Appeals of that state not to violate either the Constitution of the United States or that of Ohio; but on error to the Supreme Court of Ohio only two of the judges were of that opinion and five of the judges were of the opinion that said statute is unconstitutional and void; nevertheless an order of affirmance was entered because of the provision of Article IV, Section 2 of the Constitution of Ohio, that "No law shall be held unconstitutional and void by the Supreme Court without a concurrence of at least all but one of the judges, except in the affirmance of the judgment of a court of appeals declaring a law unconstitutional and void"; and on motion to vacate this judgment and substitute a judgment of reversal pursuant to the opinion of the majority of the judges on the ground that this constitutional limitation does not operate where the statute in question is claimed to be contrary to the Constitution of the United States, inasmuch as by Article IV of that instrument it is declared to be "the supreme law of the land" and that "the judges in every state shall be bound thereby, anything in the Constitution or laws of any state

to the contrary notwithstanding," the Supreme Court of Ohio erred in refusing so to do.

[fol. 101] Point Two

This peculiarity in the judicial structure of the Supreme Court of Ohio as illustrated in Board of Education v. Columbus, 118 O. S. 295, 296, 306 and especially 298, may make a statute of the state valid in some parts of the state and invalid in other parts,—not because such is the asserted will of the legislature in enacting such statute, nor because the act, though general in form, is in the nature of the case confined in its operation to a limited area or to a definable class of persons or things,—but solely from the lottery of discordant, inferior court decisions on a particular constitutional question which the state Supreme Court has express jurisdiction to review and yet can not bring into accord because whenever two of the seven judges hold such statute to be valid, the judgments of all the different courts of appeals throughout the state, whether pro or con, upon this question may be affirmed; and this necessarily denies the litigants the equal protection of the laws as guaranteed by Section 1 of the Fourteenth Amendment of the Federal Constitution and by Section 4 of Article IV of the same instrument which assures to each state a republican form of government.

Truax v. Corrigan, 257 U. S. 312;
White v. Hart, 13 Wall. 646;
People v. Western Union Telegraph Co., 70 Colo. 90;
Gunn v. Berry, 15 Wall. 610.

Point Three

On the merits of the constitutionality of the Park Board Act the judgment of the Supreme Court of Ohio denies the appellant the equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment in the unequal operation of the Act in subjecting the taxpayers within the district to the financial burden of acquiring and maintaining park lands outside of it; and furthermore denies the appellant the equal protection of the laws, and due process of law under said amendment and the benefit of the republican form of government guaranteed to each state by Sec-

tion 4 of Article IV in delegating to non-elective park commissioners the legislative powers of levying taxes, defining misdemeanors, appointing police officers with power to arrest, and expending tax revenues for such purposes.

Michigan Central Railroad Co. v. Powers, 201 U. S. 245, 294.

[fol. 102] Parks v. Board of Commissioners of Wyandotte County, 61 Fed. 436.

George D. Hile and Snyder, Henry, Thomsen, Ford & Seagrave, by Frederick A. Henry, Attorneys and of Counsel for Appellant.

[fol. 103] [Endorsed:] No. 238. In the Supreme Court of the United States, October Term, 1929. State of Ohio ex rel. Pauline Wadsworth, etc., Appellant, vs. John A. Zangerle, Auditor of Cuyahoga County, et al., Appellees. Statement of points to be relied on by appellant. George D. Hile and Snyder, Henry, Thomsen, Ford & Seagrave, 914 Williamson Building, Cleveland, Ohio, Attorneys for Appellant.

[fol. 104] Designation of Parts of Record to be Printed

The appellant hereby designates the parts of the record herein to be printed under the supervision of the Clerk of this court, namely:

1. Amended petition filed in Common Pleas Court of Cuyahoga County March 8, 1926, with interrogatories appended thereto.

2. The answers of (a) John A. Zangerle; (b) The Board of Park Commissioners of The Cleveland Metropolitan Park District, Harry M. Farnsworth, Warren S. Hayden, Louis E. Moses and William A. Stinchcomb; and (c) The Union Trust Company; all filed in said Common Pleas Court March 13, 1926.

3. Demurrer to interrogatories, filed in said Common Pleas Court March 25, 1926.

4. Answer to interrogatories, filed in said Common Pleas Court May 27, 1926.

5. Motions of plaintiff, (a) for a new trial, and (b) for a rehearing, filed in said Common Pleas Court February 5, 1927.

6. Transcript of docket and journal entries in said Court of Common Pleas.

7. Transcript of docket and journal entries in the Court of Appeals of Cuyahoga County.

8. Petition in error filed in the Supreme Court of Ohio, August 17, 1928.

9. Opinion of Chief Justice Marshall of the Supreme Court of Ohio, accompanying its decision of March 27, 1929.

10. Motion to vacate judgment and for judgment for plaintiff in error, etc., (not including brief supporting motion).

11. Transcript of docket and journal entries of the Supreme Court of Ohio.

[fols. 105 & 106] 12. Petition for appeal and allowance thereof.

13. Assignment of errors and allowance thereof.

14. Citation, waiver of service and entry of general appearance of appellees.

The following parts of the record may be omitted from the printing, namely:

Bond and approval thereof.

Precipe to the Clerk of the Supreme Court of Ohio for transcript to be certified to the Supreme Court of the United States, together with proof or acknowledgment of service of a copy on the appellees on June —, 1929.

George D. Hile and Snyder, Henry, Thomsen, Ford & Seagrave, by Frederick A. Henry, Attorneys and of Counsel for Appellant.

[fol. 107] [File endorsement omitted.]

Endorsed on cover: File No. 34,369. Ohio Supreme Court. Term No. 238. State of Ohio ex rel. Pauline Wadsworth, appellant, vs. John A. Zangerle, Auditor of Cuyahoga County; The Board of Park Commissioners of the Metropolitan Park District in Cleveland, Harry M. Farnsworth, et al. Filed July 12, 1929. File No. 34,369.